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VH H

Lindley









James D. Hague Esq  
with the compliments of the  
Author

San Francisco January 7<sup>th</sup> 18

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V. H. H.





*THE attention of the profession is invited to the following practical features of this work:—*

### TABLE OF CASES.

*In the citations of cases in notes to the text, the official report in which the case cited appears is alone given. The table of cases in the front of the first volume, gives, however, in addition to the year in which the decision is rendered, duplicate citations to most of the standard reports where the case has been reprinted. A few illustrations will serve to demonstrate the value of such a table over the ordinary one usually appearing in text-books:—*

*Harris v. Equator M. & S. Co. (1881), 3 McCrary 14; 8 Fed. 863; 12 Morr. 178, §§ 539, 688.*

*Iron S. M. Co. v. Elgin S. M. Co. (1886), 118 U. S. 196; L. ed. 30; 98; 15 Morr. 641, §§ 58, 318, 364, 365, 552, 567, 576, 582, 583, 593.*

*Williams v. Gibson (1887), 84 Ala. 228; 5 Am. St. Rep., 368; 4 So. Rep. 350; 16 Morr. 253, §§ 812, 813, 814, 821.*

### THE APPENDIX.

*The appendix contains the congressional, state and territorial legislation on mining subjects in force September, 1897; also the existing departmental regulations concerning the sale and disposal of mineral lands. These statutes and regulations have been annotated with reference to the text, the notes indicating the section of the work where the particular subject covered by the act is discussed. The few rulings of the courts and land department made while the work was passing through the press will also be found in these notes.*

### THE INDEX.

*In connection with indexing the text, the author has also indexed the appendix, so that the statutory declarations on a given subject will be found in connection with a reference to the section of the text where the decisions are cited and the Author's conclusions stated.*

A T R E A T I S E  
ON THE  
AMERICAN LAW RELATING TO MINES  
AND MINERAL LANDS.

WITHIN THE  
PUBLIC LAND STATES AND TERRITORIES

AND  
GOVERNING THE ACQUISITION AND ENJOYMENT  
OF MINING RIGHTS IN LANDS OF  
THE PUBLIC DOMAIN

BY  
CURTIS H. LINDLEY  
OF THE SAN FRANCISCO BAR

IN TWO VOLUMES  
VOLUME I

---

*"I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."*

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*"Et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus."*

— From Dedication of Justinian's Institutes.

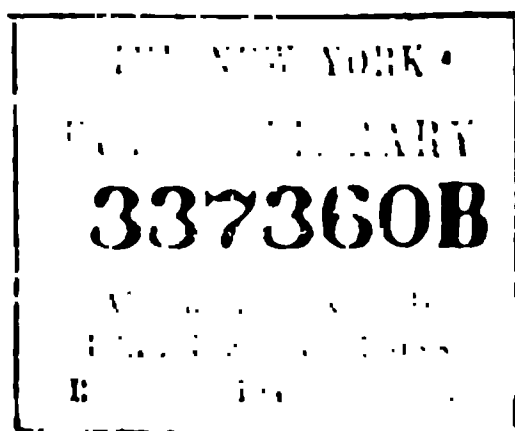
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1897

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## P R E F A C E.

THE United States cannot be said to possess a National Mining Code, in the sense that the term is used and understood among the older nations of the earth.

The system of rules which sanctions and regulates the acquisition and enjoyment of mining rights, and defines the conditions under which title may be obtained to mineral lands within the public domain of the United States is composed of several elements, most of which find expression in positive legislative enactment. Others, while depending for their existence and application upon the sanction of the General Government, either express or implied, are in a measure controlled by local environment, and are evidenced by the expressed will of local assemblages embodied in written regulations, or rest in unwritten customs peculiar to the vicinage.

American mining law may therefore be said to be found expressed —

(1) *In the legislation of Congress;*

(2) *In the legislation of the various states and territories supplementing Congressional action, and in harmony therewith;*

(3) *In local rules and customs or regulations established in different localities not repugnant to Federal legislation, or that of the state or territory wherein they are operative.*

This system, as thus constituted, is deemed national only in a restricted sense. As a rule of property, it has no application or force in many of the states of the Union.

Generally speaking, its operation is limited geographically to the area acquired by the General Government by cession from the original states, or by treaty with or purchase from foreign powers subsequent to the organization of the General Government, or perhaps, more logically stated, its operation is co-extensive with the area of the public domain, the primary

ownership and, right of disposal of which resides in the General Government.

It does not seek to regulate or control mines or mining within lands held in private ownership, except such only as are acquired directly from the Government under the mining laws, and then only forming a muniment of the locator's or purchaser's title, and measuring his rights.

It does not require the payment of either tribute or royalty, as a condition upon which the public mineral lands may be explored or worked.

It treats the Government simply as a private proprietor holding the paramount title to its public domain, with right of disposal, upon such terms and conditions, and subject to such limitations, as the law-making power may prescribe.

The National Government acquired no rights of property within the present boundaries of the thirteen original states. Nor in the states of Vermont, Kentucky, Maine, or West Virginia, which were severally carved out of territory originally forming a part of some one of the original States. Nor in Texas, as by the terms of its admission into the Union the state retained all the vacant and unappropriated public lands lying within its limits, for the purpose of liquidating its debt contracted while it was an independent republic.

The entire area of Tennessee was originally public domain; but the United States donated the same to the State, after deducting the lands necessary to fill the obligations in the deed of cession of North Carolina.

In Arkansas, Illinois, Missouri, Iowa, Michigan, Minnesota, and Wisconsin, lands of the Government containing the baser metals (lead and copper) were ordered sold under special laws, prior to the discovery of gold in California.

By acts of Congress, passed at different times, Alabama, Michigan, Wisconsin, Minnesota, Missouri, and Kansas were excepted from the operation of the general mining laws.

The system is inoperative in Oklahoma, as by congressional law all lands within that territory are declared to be agricultural.

With the exception, perhaps, of lands containing deposits of coal, and some of the baser metallic substances, the system

is practically confined in its operation to those states and territories lying wholly or in part west of the one hundredth meridian, embracing the states of California, Colorado, Oregon, Washington, Nevada, Idaho, Montana, North Dakota, South Dakota, Wyoming, and Utah, the territories of Arizona and New Mexico, and the district of Alaska. These comprise the precious-metal-bearing states and territories of the "Public Domain."

As thus defined and limited, "American Mining Law" is the subject of this treatise.

While in the treatment of the subject, and in the discussion of the origin and growth of the system, as we understand it, we shall at times encounter the earmarks of an older civilization and find lodged in what we might term a primitive custom, the experience of ages; yet wherever its rules depart from the doctrine of the common law, the system, as such, is of recent birth and modern development. It is an evolution from primitive and peculiar conditions, a crystallization of usages which do not appeal to antiquity for either their force or wisdom.

It is the principal design of this work to treat of this system as it is at present constituted. But as it is in itself an evolution out of antecedent and somewhat complex conditions, some space will be devoted to a consideration of an historical nature concerning the policy of the Government in dealing with its mineral lands prior to the enactment of general laws affecting them, and to trace the growth of the system through its various stages of development.

As an appropriate introduction to a treatise of this nature, the Author has inserted a chapter epitomizing the different systems of mining jurisprudence in force at different periods in the countries from which the United States acquired its public domain. We may reasonably expect to find in the growth and development of our own system the influence of those laws. It has also been deemed advisable to insert a brief review of the systems adopted in the states of the Union wherein the Federal Government acquired no property, and where the regulation of the mining industry falls exclusively within the jurisdiction of state legislation.

This comparative review of the mining laws, foreign and state, will at least be of historical interest, if it should serve no other or higher purpose.

As state and territorial legislation supplementing the acts of Congress is permitted, if not in fact contemplated, by the Federal laws, careful consideration will be given to these local statutes and the decisions of courts in construing them. The value of a decision as a precedent often depends on local conditions. The legitimate scope of this permissive local legislation is a fruitful subject of controversy.

The existing legislation of each state and territory supplementing the Federal laws, together with references to legislation on cognate subjects, will be found in the appendix, with citations under each section indicating where the subject-matter has been discussed and generally treated in the text.

The appendix also contains the various acts of Congress upon the subject of mineral lands, and the regulations of the land department, with back references to the text; also such forms as in the Author's judgment might be serviceable to the profession.

In citing authorities the Author has adopted the rule of citing the case from the original report only; but in the table of cases will be found the date of the decision, and a citation to every standard report, including the "National Reporter" system, wherein the case appears.

Realizing the importance of a comprehensive and exhaustive index, the Author has himself undertaken the work of its preparation.

While the treatise is in the main devoted to a consideration of the federal mining system, to meet the general expectation of the profession, we deem it advisable to devote some space to cognate subjects, including rights and liabilities arising out of the conduct of mining ventures, mining partnerships, cotenancy, and obligations flowing from contractual relations.

The necessity for a comprehensive treatise on American mining law is conceded. The literature on this branch of jurisprudence is limited. Most of the works which have been

presented to the profession, while possessing great merit, have not attempted a systematic or philosophical treatment of the subject.

The preparation of a work which will fulfill the requirements of the profession and prove measurably satisfactory, is a matter of great moment, involving much time and patient labor.

While not anticipating that the result of his efforts will fully meet the wants of the profession, the Author expresses a hope that it will be found of value to those who are interested in the study of the many intricate questions arising out of the mining laws.

When in the preparation of the text he has been instructed or guided by the original work of others, it has been the aim of the Author to give due credit in the appropriate place. Yet he has derived so much benefit and assistance in so many ways from various authors and writers upon mining subjects, that he deems it a duty as well as a pleasure to here specifically express his acknowledgments.

Professor Rossiter W. Raymond, lawyer, scholar, and scientist of national renown, has contributed in a marked degree to the literature on mining subjects. His extended experience in the field of practical mining, his connection with much of the important mining litigation in the West, his thorough knowledge of the ever-varying geological conditions, to which are to be applied the unyielding terms of Congressional laws, have made him pre-eminent in the field of mining literature. His reports as Commissioner of Mining Statistics abound with fruitful suggestions, and contributed in no small degree to the adoption of the act of 1872. His monograph, "Relations of Governments to Mining" (in "Mineral Resources West of the Rocky Mountains," 1869); his article on "Mines," (appearing in Lalor's "Cyclopedia of Political Science"); his numerous papers read before the American Institute of Mining Engineers, notably, "Law of the Apex," "Lode Locations," "End Lines" and "Side Lines," "The Eureka-Richmond Case"; and his occasional contributions to the "Engineering and Mining Journal," have afforded the Author great and valuable aid.

Professor Raymond's immediate predecessor in the work of collecting Mining Statistics, Mr. J. Ross Browne, rendered

valuable service to the mining industry, and his reports to the Government contain much that is valuable and important, giving as they do the early history of mining in the West, and the customs, rules, and regulations of miners, which formed the basis of our first mining statutes.

The Author has also derived great assistance from previous works on the subject, notably "Mining Claims and Water Rights," by Hon. Gregory Yale, the pioneer work on the subject of American mining law; "Mining Rights in the Western States and Territories," by Hon. R. S. Morrison, of the Colorado Bar; Weeks on "Mineral Lands," Copp's "U. S. Mineral Lands," and Wade's "American Mining Law."

As the closing chapters of the work were being printed, the "Mineral Law Digest" of Messrs. Clark, Heltman, and Consaul, a conscientious and valuable contribution to mining literature, made its appearance.

The Author is under special obligations to the Hon. Wm. H. De Witt, late judge of the supreme court of Montana, Edwin Van Cise, Esq., of Deadwood, South Dakota, Hon. Jacob Fillius, and Harvey Riddell, Esq., of the Colorado Bar, for many valuable and timely suggestions.

The numerous diagrams illustrating the important subjects of "Dip," "Strike," and the "Extralateral Right" are the handiwork of Mr. J. W. D. Jensen, of San Francisco, to whom all credit is due. These figures, except those used for hypothetical purposes, were all reduced by scale from officially authenticated maps and surveys.

With these grateful acknowledgments, the Author submits his work to a critical but ever-indulgent profession.

CURTIS H. LINDLEY.

*San Francisco, 1897.*

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- Yoakum, In re (1874), 1 C. L. O. 3, § 140.
- York Railway Co. v. Winans (1854), 17 How. 31; L. ed. 15; 27, § 773.
- Young v. Ellis (1895), 91 Va. 297; 21 S. E. Rep. 480, § 861.
- Young v. Hanson (1895, Iowa), 64 N. W. Rep. 654, § 772.
- Zadig v. C. P. R. R. (1895), 20 L. D. 26, § 208.
- Zeckendorf v. Hutchison (1871), 1 New Mex. 476; 9 Morr. 483, §§ 337, 630.
- Zollars v. Evans (1880), 2 McCrary, 39; 5 Fed. 172, § 345.
- Zunrwalt, In re (1895), 20 L. D. 32, § 197.

**AMERICAN LAW RELATING TO MINES  
AND MINERAL LANDS.**



# **TITLE I.**

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## **COMPARATIVE MINING JURISPRUDENCE.**

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### **CHAPTER**

**I. MINING LAWS OF FOREIGN COUNTRIES.**

**II. LOCAL STATE SYSTEMS.**



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## CHAPTER I.

### MINING LAWS OF FOREIGN COUNTRIES.

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§ 1. **Introductory.**—To the student of the system of mining laws in force in the United States, a comparative review of the mining jurisprudence of the different countries of the world is not of controlling importance. The evolution and development of the American system have their parallels in the history of older nations; other countries have recognized and established by written codes the customs of mining communities, and it is by no means difficult to discover in some of the details of our own system the earmarks of ancient mining regulations: yet in construing our laws and applying them to existing conditions we will receive but little material aid from the experience or legal literature of other countries. While this is true, we must consider that the common law of England

was to a certain extent ingrafted into our legal system when we separated from the mother country, and was, and still is, the rule of action in the absence of legislation, and that, at least in the earlier history of our government, English precedents were of controlling force. In this light, not only the English common law, but the rules governing the subject of mines in Great Britain, are worthy of at least passing comment.

When we also consider that, approximately, all of our public mineral domain over which the Federal laws are now in force was originally acquired by treaty or purchase from France and Mexico, wherein the civil law was the basis of jurisprudence, and that at the time of cession both of these nations had well-established and defined codes of mining law, it is apparent that a brief presentation of the laws of these ceding nations will not be out of place. We may confidently expect to find in the growth and development of our own system the influence of these laws. These considerations justify the author in presenting such a brief outline of the mining jurisprudence of these several countries as will enable us to note the theories of government upon which the laws are based, their salient features, and to observe to what extent, if any, they have left their impress upon the American law of mines.

§ 2. **Property in mines under the common law.**—As a general rule, under the common law, minerals were the property of the owner of the land, the property in the surface carrying with it the ownership of everything beneath and above it.<sup>1</sup>

Therefore, the ownership of the surface was the best *prima facie* title to the ownership also of the mines.<sup>2</sup>

This *prima facie* ownership continued until rebutted, by showing either —

(1) That the land contained “royal mines”; or —

<sup>1</sup> 2 Blackstone's Comm., p. 18; Arundel on Mines, p. 3.

<sup>2</sup> Bainbridge on Mines, 4th ed., p. 118; MacSwinney on Mines, p. 27; Rogers on Mines, p. 247.

(2) That it was subject to some particular custom that defeated the *prima facie* ownership, as in the case of the tin mines of Cornwall and Devon and the lead mines of Derbyshire; or—

(3) That the ownership of the mines and minerals had become in fact, from divers causes, several and distinct from the ownership of the soil and surface.<sup>1</sup>

§ 3. **Royal mines.**—By the term "royal mines" was meant mines of gold and silver. These belonged exclusively to the crown, by prerogative, although in lands of subjects. In this respect, the rule was the same as under the civil law. It was at one time contended that mines or mineral deposits containing the baser metals in combination with either gold or silver were royal mines. This contention, however, was set at rest by statutes enacted during the reign of William and Mary,<sup>2</sup> wherein it was declared that no mine should be deemed royal by reason of its containing tin, copper, iron, or lead in association with gold or silver. Thus, those mines only came to be classed as royal in which were found the precious metals in the pure state. There is no authentic record of any such ever having been known to exist in England, unless we accept the traditional accounts of the Roman invasion as establishing their existence.

In certain reigns the crown claimed a right to mines of alum and saltpeter; but the asserted prerogative was rarely exercised, and then only in an arbitrary way.<sup>3</sup>

. Mines and minerals of all descriptions underlying the beds of navigable streams belonged to the crown.

As to mines under the sea or its shores, generally speaking, the rule of proprietorship of the soil obtained. The crown owned the sea-bottom adjoining the coasts of the United Kingdom and that part of the seashore from low-water mark to the line of the neap tides. Mines under-

<sup>1</sup> Bainbridge on Mines, 4th ed., p. 27.

<sup>2</sup> 1 William and Mary, c. 30; 5 William and Mary, c. 6.

<sup>3</sup> Bainbridge on Mines, 4th ed., p. 133.

neath the seashore belonged *prima facie* to the littoral owner or to the crown, as the superjacent soil belonged to the one or the other.<sup>1</sup>

The right of the crown to royal mines, as a branch of the royal prerogative, is said to have had its origin in the king's right of coinage.<sup>2</sup> But, as Mr. Bainbridge observes, it is more probable that the royal right arose in Roman times, and was transmitted to successive sovereigns. As regards mines of gold and silver, there is no difference between the Roman, or civil, law and the English mining laws, as regards imperial mining rights.

A mine royal was not an incident inseparable from the crown, but might be severed from it by apt and precise words. But a grant by the crown of lands would not pass gold or silver mines, unless they were expressly named, and this applied to a grant of lands in the colonies.<sup>3</sup>

Briefly stated, the regalian right to mines, as recognized in England, was confined to those of the precious metals—gold and silver. The baser substances belonged to the owner of the soil, except in certain localities where immemorial custom had modified the rule.

§ 4. **Local Customs.**—In certain parts of England and Wales so-called “local customs” were recognized which modified the general rule of the common law. In these excepted localities the ownership of the baser mineral substances continued in the crown, subject to certain so-called customary rights in the subject, which customary rights have been from time to time recognized and defined by statute.<sup>4</sup>

These excepted districts were the Forest of Dean (including the hundred of St. Briavels), in the county of Gloucester, certain parts of Derbyshire, Cornwall, and Devon, and other places of minor importance.

<sup>1</sup> MacSwiney on Mines, pp. 30-31; Bainbridge on Mines, 4th ed., p. 171; Rogers on Mines, p. 178.

<sup>2</sup> Bainbridge on Mines, 4th ed., p. 120.

<sup>3</sup> MacSwiney on Mines, p. 40.

<sup>4</sup> Bainbridge on Mines, 4th ed., p. 113.

These customs undoubtedly had their origin during the Roman occupation; but they were recognized and established by acts of Parliament upon the theory that they existed by virtue of some antecedent grant or concession made by the crown. These customs are of more than passing interest, not only on account of the antiquity of their origin, but because they afforded to the early miners of California, in many particulars, valuable precedents to guide them in framing their primitive local rules. A brief consideration of them will not be out of place.

§ 5. **The tin mines of Cornwall.** The right of working tin mines was conferred upon all "free tinnerns," upon the render of a certain proportion of the minerals raised to the owner or lord of the soil. This proportion was called "dish," or "toll," tin, and was usually one fifteenth of the product. Any tinner was allowed to "bound" any unappropriated waste lands, or inclosed lands which had formerly been waste lands, subject to the custom. He "bounded" the same by delivery of toll tin to the lord of the soil. A tin bound generally consisted of about an acre of land, the four corners of which were marked by turfs or stones at each corner. A side bound of triangular form was also allowed.<sup>1</sup>

The boulder was required to proclaim his bounds at the next ensuing stannary courts, announcing the limits of his bounds and the names of his co-adventurers, if any. This proclamation was repeated at the two ensuing stannary courts; and if no opposition appeared, a writ of possession issued from the court commanding the bailiff to put him in possession. Possession was then delivered, and the tinner became entitled to search for and extract ore.

Bounds were required to be annually renewed, by remarking the corners. The tinner failing to renew his bounds within the year might, however, be restored to his estate by renewing them at any time before others should enter and bound.<sup>2</sup>

<sup>1</sup> Bainbridge on Mines, 4th ed., p. 149. <sup>2</sup> MacSwinney on Mines, p. 431.

Tin bounds might be sold or demised, were frequently farmed out for a render called "farm tin," and were liable to the payment of debts and legacies. The estate was in the nature of a chattel real, and passed to the executor.<sup>1</sup>

If the owners of bounds left them unworked for a year, other tanners might enter and work them, if they gave the owners notice of their desire to work, and the owners did not within two months resume operations.

A bounder was not compelled to prosecute his work continuously with absolute strictness. He was allowed a reasonable time for consideration, preparation, and selection of places; but he should not cease to pursue in good faith his original object. If he did, the owner of the soil might resume his exclusive rights.<sup>2</sup>

Stannary courts were local tribunals, existing from time immemorial, and recognized by royal charters. They were courts of record, with both common-law and equity jurisdiction, wherein controversies concerning miners or their property rights were adjusted.

§ 6. **Tin mines in Devonshire.**—Tin-bounding in Devonshire was governed generally by customs similar to those of Cornwall. The estate, however, of the bounder was that of fee simple, and descended to the heir at law.<sup>3</sup>

§ 7. **Coal, iron, and other mines in the Forest of Dean and the hundred of St. Briavels.**—The "free miners" within the hundred of St. Briavels (which embraces the Forest of Dean) were entitled by immemorial custom to have granted to them "gales" of the mines of coal and iron and leases of the quarries of stone within the lands of the crown, and within enclosed lands under certain restrictions. By the term "free miner" was meant all male persons born and abiding within the hundred, of the age of twenty-one and upwards, who had worked a year and a day in the mines within the hundred.

<sup>1</sup> MacSwinney on Mines, p. 432. <sup>2</sup> *Id.*, p. 432. <sup>3</sup> *Id.*, p. 438.

All free miners were required to register with the gaveler of the forest or his deputy, the gaveler being the representative of the crown.

A "gale" was the name given to the holding of mines of coal or iron and quarries of stone, the free miner acquiring a gale being styled the "galee," and the rentals paid were called "galeage."<sup>1</sup>

A gale was acquired by written application in writing to the gaveler, setting forth the situation of the proposed gale and the name of the vein proposed to be worked. After obtaining the approval of the commissioner of the woods, the gaveler set out the metes and bounds, and a grant thereof was made and entered in the gaveler's book, and subsequently enrolled in the office of land revenue.

The estate thus granted to a galee was in the nature of an estate in fee simple, and descended to the heir.<sup>2</sup>

The galee was obliged to work in a fair, orderly, and workmanlike manner, and not to desist from working for five years at any one time after the vein in question had been gained.<sup>3</sup>

Gales might be assigned and disposed of by deed or will. Transfers were required to be entered within three months in the books of the gaveler, and unregistered transfers were void. Non-payment of galeage and failure to comply with the rules subject to which gales were held worked a forfeiture.

**§ 8. The lead mines of Derbyshire.**—The customs recognized and established in certain portions of Derbyshire were confined to lead mines. Under these regulations, any subject of the realm might enter and search for ore in all lands and places within the district, excepting churches, burial-grounds, dwelling-houses, and highways. The first discoverer of a vein was entitled to have assigned to him two "meers" of ground. If the vein was a "rake" vein—that is, one having an inclination from the horizontal,—the meer was from twenty-seven to thirty-two yards, meas-

<sup>1</sup> MacSwiney on Mines, p. 482. <sup>2</sup> *Id.*, p. 483. <sup>3</sup> *Id.*, p. 489.



ured along the vein. If the vein, or stratum, was bedded, or flat, the meer was fourteen square yards, or thereabouts. The meers were measured and set out by the "barmaster," an official who acted as an agent of the crown or its lessees, and also looked after the interest of the miner and enforced the customs of the manor.

The miner was entitled to so much surface land in connection with his vein as was thought necessary by the barmaster and two of the grand jury, for the purpose of laying rubbish, dressing ore, buddling, etc. This was called the "quarter-cord," as originally in the "Low Peak" it consisted of a quarter of a meer in breadth.

Whether this was to be measured from the middle of the vein or the walls, was a mooted question.

Before any ground was set apart, however, ore was required to be raised and the meer freed. "Freeing the meer" was accomplished by delivering to the crown or its lessee the first "dish" of ore.

This dish, called the "freeing dish," was provided by the barmaster, and was of sufficient size to contain fifteen pints of water.

In like manner, each successive meer allotted on the vein must have been "freed." This ceremony was equivalent to the livery of seisin, and without it title did not pass.

The "duties," or royalties, exacted from the miner were called "lot and cope." "Lot" was usually one thirteenth part of all the ore raised, payable to the crown or its lessees.<sup>1</sup> "Cope" was fourpence for every load of ore, a load consisting of nine dishes.

It was always necessary that the mine should continue to be fairly worked. Originally, if it was capable of being worked, and was suffered to remain idle for several weeks, the barmaster was required to "nick the spindle" once a week—the spindle being a stake fixed in the ground, marking the boundaries of the meer, and the nick was a notch. An examination of the spindle disclosed the num-

<sup>1</sup> These duties are usually farmed out.

ber of notches, and the mine became forfeited a few weeks after the third "nicking," unless the warning was heeded and work resumed. This ceremony was equivalent to an entry after breach of condition, by which the lord or lessor was restored to his former estate. Under the regulations now in force, forfeiture is worked by notice to resume given by the barmaster. If resumption does not take place within three weeks, the claim is forfeited, and may be assigned by the barmaster to any person willing to work it.

The right of possession and enjoyment was guaranteed so long as the regulations were complied with.

Once freed, and kept in lawful possession, the mine was declared to be an estate of inheritance liable to dower and capable of absolute disposition.<sup>1</sup>

While we do not find anything in the authorities expressly defining the extent to which the miner might follow his "rake vein" in depth, it is quite manifest that the vein was the principal thing acquired, and that the surface ground allotted by the barmaster was a mere incident, and that the miner might pursue his vein on its downward course, even under excepted lands, provided no injury resulted to the surface. The working might be suspended or regulated by the steward and grand jury.<sup>2</sup>

§ 9. **Severance of title.**—Under the English law, rights of property in the surface and in the underlying mines might be shown to be in different owners. Nothing was more common than to sell or demise a piece of land excepting the mines. In like manner, the different strata of the subsoil might be shown to be the subject of different rights.<sup>3</sup> And there might be also in one mine different minerals which were the property of different persons.<sup>4</sup>

Thus, one person might be entitled to the iron, and another to the limestone. One seam or stratum of coal, if

<sup>1</sup> Bainbridge on Mines, 4th ed., p. 141. <sup>2</sup> MacSwinney on Mines, p. 509.

<sup>3</sup> MacSwinney on Mines, p. 27; *Cox v. Glue*, 5 C. B. 549; Arundel on Mines, p. 5; Bainbridge on Mines, 4th ed., p. 28.

<sup>4</sup> Arundel on Mines, p. 5.

in the same lands, might belong to a third person, and another distinct seam to a fourth owner.<sup>1</sup>

When the surface and underlying mines or the different strata of the subsoil were differently owned, they were separate tenements, with all the incidents of separate ownership<sup>2</sup>—a distinct possession and distinct inheritance;<sup>3</sup> and the mines of each stratum might be held in fee simple,<sup>4</sup> or fee tail,<sup>5</sup> or otherwise, as in the case of surface property.<sup>6</sup>

§ 10. **Existing English laws.**—The legislation in England on the subject of mines, except as to the particular districts heretofore noted, is limited, generally speaking, to acts providing for official inspection and regulations concerning manner of working. England has no general mining laws. Legal questions governing the ownership of mines and minerals have been determined upon the general principles of the common law, except in the localities where ancient customs have been recognized and established by acts of parliament. As we have seen, under the common law, generally speaking, the owner of the soil is the owner of the minerals. The owner of the minerals may deal with them as he pleases, subject only to the general rule governing all classes of property, that he shall injure no one else.

§ 11. **Mines under the civil law.**—Under the Roman law, the ownership proper of all lands was vested in the state. This was the *dominium strictum*. The individual subject could acquire the possessory ownership, with the

<sup>1</sup> Bainbridge on Mines, 4th ed., p. 28.

<sup>2</sup> MacSwinney on Mines, p. 27, (citing *Rowbotham v. Wilson*, 8 E. & B. 142; *Hamilton v. Graham* L. R., 2 Sc. & D. 166; *Seaman v. Vaudray*, 16 Ves. 392; *Guest v. East Dean* L. R., 7 Q. B. 337).

<sup>3</sup> Bainbridge on Mines, 4th ed., p. 28; *Cullen v. Rich*, Bull N. P. 102; 2 Str. 1142, *sub nom.* *Rich v. Johnson*.

<sup>4</sup> *Stoughton v. Leigh*, 1 Taunt. 402.

<sup>5</sup> *Port v. Tuston*, 2 Wils. 172.

<sup>6</sup> MacSwinney on Mines, p. 27.

right to extract minerals, upon the payment of royalties. This was the *dominium utile*.

Under a decree of the Emperor Gratian (A. D. 367-383), the right to the crown in mines of gold and silver was exclusive; that is, the *dominium strictum* and *dominium utile* were united in the state. As to other mines, the crown had a right to receive a proportion of the produce, which proportion, or the measure thereof, was called the *canon metallicus*.

This decree of the Emperor Gratian was embodied in an imperial constitution, which was recognized and adopted by subsequent emperors, and thus became the expression of the measure of Roman imperial rights in mines.<sup>1</sup>

Gamboa, in his commentaries on the mining ordinances of Spain, thus states the rule of the civil law:—

"By the civil law, all veins and mineral deposits of gold or silver ore, or of precious stones, belonged, if in public ground, to the sovereign, and were part of his patrimony; but if in private property, they belonged to the owner of the land, subject to the condition, that if worked by the owner, he was bound to render a tenth part of the produce to the prince as a right attaching to his crown; and if worked by any other person, by consent of the owner, the former was liable to the payment of two tenths, one to the prince and one to the owner.

"Subsequently, it became an established custom in most kingdoms, and was declared by the particular laws and statutes of each, that all veins of the precious metals, and the produce of such veins, should vest in the crown, and be held to be a part of the patrimony of the king or sovereign prince."

Mr Arundel Rogers thus states his conclusions from the various authorities consulted:—

"Under the civil law, in its purest times, gold, silver, and other precious metals usually belonged to the state, whilst all other minerals, mines, and quarries belonged to the owner of the soil, subject in some cases to a partial, and in others to a more general, control of the *fiscus* (treasury)."

<sup>1</sup> Bainbridge on Mines, 4th ed., p. 114.

<sup>2</sup> Commentaries of Gamboa—Heathfield Trans., vol. I., p. 15.

This feature of the civil law underlies most of the continental systems, as well as those of the Spanish-American republics. It is the regalian doctrine, which also prevails as to royal mines (gold and silver), under the common law of England.<sup>1</sup>

The equitable estate, the *dominium utile*, which was vested in the subject, was permanent in its character, and has been defined as an ownership which the possessor could describe and claim as such against all the world, save and except his lord the emperor.

This estate was analogous to the tenancy by copyhold under the English common law, the tenant being seized thereof as against all the world, saving and excepting only his lord.<sup>2</sup>

It also bears a striking resemblance to the tenure by which a mining claimant holds a perfected but unpatented mining location upon the public mineral lands of the United States.

The theory of the civil law is thus clearly stated by Mr. Halleck :—

“ All continental publicists who have written upon the subject lay down the fundamental rule, that mines, from their very nature, are not a dependence of the ownership of the soil; that they ought not to become private property in the same sense as the soil is private property; but that they should be held and worked with the understanding, that they are by nature public property, and that they are to be used and regulated in such a way as to conduce most to the general interest of society.”<sup>3</sup>

§ 12. **Mining laws of France.**—From the earliest times, the French law placed all mines, whether in public or in private lands, at the disposition of the nation, and made the working of them subject to its consent and to the surveillance of the government.<sup>4</sup>

The French law divided the subject of mining into three classes — *mines*, *minières*, and *carrières*.

<sup>1</sup> Bainbridge on Mines, 4th ed., p. 117.      <sup>2</sup> *Id.*, p. 200.

<sup>3</sup> Introduction to De Fooz on the Law of Mines, p. x, § 2.

<sup>4</sup> *Id.*, p. xv., § 8.

*Mines*, properly speaking, were those wherein the substances were obtained from underground workings, the extraction of which required extensive development and elaborate machinery. In the language of De Fooz,—

"Mines of this kind constitute a part of the domain of the state: they are to be ranked as the property of society, and should be confided to the sovereign authority; and this authority should have a general control over their extraction. In this consists the system of the regalian right of mines."<sup>1</sup>

Taking the act of April 21, 1810, as the basis of the French law, as it existed during the period presently under consideration, we give the following outline of its general features:—

*Mines*.—Those were considered as mines which were known to contain, in veins, beds, or strata, gold, silver, platinum, quicksilver, lead, iron (in veins or beds), copper, tin, zinc, bismuth, arsenic, manganese, antimony, molybdenite, plumbago, or other metallic substances; sulphur, coal, fossilized wood, bituminous substances, alum, or sulphates. To this category, by law of June 17, 1840, salt springs and salt mines were added.

*Mines* could only be worked in virtue of an act of concession, which vested the property in the *concessionnaire*, with power to dispose of and transmit the same like other property, except that they could not be sold in lots or divided without the consent of the government, given in the same form as the concession. Royalties were payable to the owners of the surface and to the government. No one could make searches for the discovery of mines in land which did not belong to him, unless with the consent of the proprietor of the surface, or with the authorization of the government, subject to a previous indemnity to the proprietor and after he shall have been heard. The proprietor might make searches without previous formality; but he was required to obtain a concession before he could establish a mine-working. From the moment a mine was

<sup>1</sup> Halleck's De Fooz on the Law of Mines, p. 10.

conceded, even to the proprietor of the surface, this property was distinguished from that of the surface, and was thereafter considered as a new property. Concessions were obtained by petition, addressed to the prefect, who registered it, and posted notice thereof for a period of four months. Proclamations were required to be made at certain places and times at least once a month during the continuation of the postings. Investigations were required to be made by the prefect of the department on the opinion of the engineer of mines, the results being transmitted to the minister of the interior. In the absence of opposition, concessions were granted by an imperial decree, deliberated upon in council of state. The act of concession determined the extent, which was to be bounded by fixed points taken on the surface of the soil, and by passing vertical planes from the surface into the interior of the earth to an indefinite depth. The engineers of mines exercised, under the orders of the interior and the prefects, a surveillance of police, for the preservation of edifices and the security of the soil. Royalties were payable to the government proportional to the yield, in addition to a fixed tax, called "ground tax." Forfeiture of the privilege granted by the concession resulted from a failure to comply with its terms, or from suspension of the works, if by such suspension the wants of consumers were affected, or if the suspension had not been authorized by the mining authorities.

*Minières* included the iron ores called alluvial, pyritous earths suitable for being converted into sulphate of iron, aluminous earths and peats, and such substances as could be worked by open pits or temporary subterranean works. The ownership of *minières* was in the surface proprietor; but they could not be worked by subterranean works except by permission. When worked by open workings, a declaration was required to be made to the prefect of the department. No royalties were paid to the government.

*Carrières* (quarries) included slates, building-stones, marble, limestones, chalks, clays, and all varieties of earthy or



stony substances, including pyritous earths, regarded as fertilizers, all worked in open cut or with subterranean galleries.

Workings of *carrières* in open cut were made without permission, under the simple surveillance of the police. When the working was carried on by means of subterranean galleries, it was subject to surveillance as in the case of mines. No royalties were paid to the government.

§ 13. **Mining laws of Mexico.**— We have no immediate concern with the present mining laws of Mexico. The existing code of that republic is a substantial departure from the old order of things, and furnishes the best example of a liberal and progressive system of mining laws of any which has heretofore been adopted in any country. But we are dealing with matters of history, and are called upon to consider the state of the Mexican law of mines at the time of the discovery of gold in California and the acquisition by our government of the territory ceded by the treaty of Guadalupe Hidalgo.

Upon the establishment of the independence of Mexico (1821), it adopted, in reference to mining, the laws existing previous to its separation from Spain, with such modifications only as were rendered necessary by the alteration from a monarchical to a republican form of government.<sup>1</sup>

Questions concerning mines and mining rights in the republic depended, in a great measure, during the period which engages our present attention, upon the provisions of the Spanish ordinance of the 23d of May, 1763, and, in fact, until a comparatively recent period, these ordinances were still in force, and constituted the principal Mexican code on that subject.<sup>2</sup>

The following is an epitome of such parts of these ordinances as are germane to the present inquiry. —

*Nature and conditions of mining concessions* — Mines were declared to be the property of the royal crown. Without

<sup>1</sup> Rockwell's Spanish and Mexican Law, p. 21.

<sup>2</sup> *Castillero v. United States*, 2 Black, 371.



being separated from the royal patrimony, they were granted to subjects in property and possession in such manner that they might sell, exchange, pass by will, or in any other manner dispose of all their property in them upon the terms on which they themselves possessed it, and to persons legally capable of acquiring it. This grant was made upon two conditions: First, that the grantees should pay certain proportions of the metal obtained to the royal treasury; second, that they should carry on their operations in the mines subject to the provisions of these ordinances, on failure of which at any time the mines of persons so making default should be considered as forfeited, and might be granted to any person who should denounce them.

*Rights of discoverer — Pertenencia.*—The discoverers of new mineral districts were permitted to acquire three *pertenencias*, or claims, on the principal vein, a *pertenencia* being two hundred *varas*, or yards, along the course of the vein.<sup>1</sup> The discoverer of a new vein in a district known and worked in other parts was entitled to two *pertenencias*, either contiguous or separated.

*Right to mine, how acquired.*—The organization of district tribunals was provided for, called deputations of miners, to whom, within ten days after discovery, the discoverer should present a written statement. This statement was required to contain the discoverer's name and those of his associates, his place of birth, residence, and occupation, together with the most particular and distinguishing features of the tract, mountain, or vein discovered, all of which were noted in the registry of the deputation. Notices of this statement, its object and contents, were required to be fixed to the doors of the church, the government houses, and other public buildings of the town, for the sake of general notoriety. Within ninety days thereafter, the discoverer

<sup>1</sup> The term "claim" is here used as the equivalent of the Spanish word *pertenencia* (literally, a portion), without regard to the technical definition of the word given by some of the American courts in later years.

was required to make in the vein or veins so registered an opening a yard and one half wide and ten yards in depth, that one of the deputies, with an expert and two witnesses, might inspect it and determine the course and direction of the vein, its size, its dip, or inclination from the horizon, and the principal species of mineral found therein.

The report of the deputy was added to the registry, together with the act of possession, which must be given to the discoverer, measuring off his *pertenencias*, and requiring him to mark their boundaries. A copy of the entries in the register constituted his "titulo de possession," or evidence of his possessory right.

If during the period of ninety days any adverse claimant appeared and claimed the property, as being a prior discoverer, a brief judicial hearing was granted, and judgment given in favor of him who best proved his claim. If a question arose as to who had been the first discoverer of a vein, he was considered as such who first found metal therein, even though others might have made an opening previously; and in case of further doubt, priority of registration established a priority of right.

*Denouncement of abandoned mines.*—Restorers of ancient mines which had been abandoned enjoyed the same privileges as discoverers. In case of such abandoned mines, the party desiring to acquire them was called upon to present to the deputation a statement similar to that required of a discoverer, showing, in addition, the name of the last possessor and those of the neighboring miners, all of whom should be lawfully summoned. If no one appeared within ten days, the denouncements were required to be publicly declared on the three following Sundays. This meeting with no opposition, the denouncer was required within sixty days to clear and reinstate the abandoned workings to some considerable depth, or at least ten yards perpendicular and within the bed of the vein, in order that it might be inspected and the facts ascertained as required in case of original discoveries. These things being done, the

*pertenencias* were measured, boundaries marked, and possession given as in other cases.

*Right to denounce mines in private property.*—Any one might discover or denounce a vein, not only on common land, but also on the property of any individual, provided he paid for the overlying surface and compensated the owner of the soil for the damage caused by exploration, the amount of such damage to be fixed by arbitration, in case of disagreement between the parties.

*Rights of one not a discoverer.*—One not a discoverer was prohibited from denouncing two contiguous mines upon one and the same vein; but there was no limit to the number he might acquire by purchase, gift, inheritance, or just title.

*Placers.*—Placers and other deposits in beds of gold and silver, precious stones, copper, lead, tin, quicksilver,<sup>1</sup> antimony, zinc, bismuth, rock salt, or fossils, perfect or mixed metals, bitumen, mineral tar, asphaltum, etc., might also be registered and denounced.

*Foreigners and religious orders.*—Foreigners were originally prohibited from working the mines; but by decree (October 27, 1823) they were permitted to supply miners with capital and hold shares (*acciones*) in the enterprise, and later (March 16, 1842), foreigners resident in the republic might acquire ownership of mines. Religious orders of both sexes were prohibited from acquiring mines, “as being contrary to the sanctity and exercise of their profession.”

*Extent of pertenencia — Surface limits — Rights in depth.*—With reference to surface ground in connection with the vein, and the extent to which the vein might be worked, it

<sup>1</sup> As to quicksilver, it was originally provided that the government should have the preferential right of working the mines, indemnifying the discoverer in some equitable way; or the discoverer might work them, but was required to deliver the product to the agents of the royal treasury, and receive therefor a stipulated price. These provisions, however, became obsolete and inoperative in Mexico.

would seem that prior to promulgation of the "new ordinances" it was "one of the greatest and most frequent causes of litigation and dissension among the miners." To avoid this, it was decreed that the lateral extent of a *pertenencia* on a vein was to be regulated according to the inclination of the vein. To illustrate: A *pertenencia* was two hundred yards along the vein. The miner was to have a parallelogram two hundred yards long by one hundred yards wide, the lateral measurement to be at right angles to the former. The inspection of the preliminary work by the deputy and expert was supposed to determine the position of the vein in the earth. If it was perpendicular, the one hundred yards was to be measured on either side of the vein, or divided on both sides, as the miner might prefer. If the vein was not perpendicular—as it never was,—the miner was allowed lateral measurement proportionally to the inclination of the vein, the maximum being two hundred yards on the square, on the declivity, or "pitch," of the vein. So that a *pertenencia* on a vein might equal, but could never exceed, "the square of two hundred level yards." Ordinarily, the miner was limited to vertical planes drawn through his surface boundaries, and was therefore compelled to stop the pursuit of his vein upon reaching his bounding plane, unless the ground outside was unclaimed (*terreno virgen*), in which case he was called upon to denounce the adjoining ground.

As to placers and other kindred deposits, the size of the *pertenencias* was regulated by the district deputations of mines, attention being paid to the extent and richness of the place and to the number of applicants for the same, with preference to the discoverers.

*Marking boundaries.*—The *pertenencias* having been regulated by the deputation, the miner was required to mark his boundaries by permanent stakes or landmarks such as should be secure and easy to be distinguished, and to enter into an obligation to keep and observe them forever, without being able to change them, though he may

allege that his vein has varied in course or direction; "but he must content himself with the lot Providence has decreed him, and enjoy it without disturbing his neighbors." If he had no neighbors, he might alter his boundaries, with the consent and under the authority of the deputation.

*Right to all veins found within boundaries of pertenencia.*—The mine owner was entitled to possess not only the principal vein in the *pertenencia* denounced by him, but likewise all those which in any form or manner whatever are to be found in his property; so that if a vein takes its rise in one property, and, passing on, is found in another, each proprietor was entitled to enjoy the part of it which passes through his particular limits, and no one was entitled to claim entire possession of a vein from having its source in his portion, or on any other pretense whatever.

*Forfeiture for failure to work.*—With reference to working the mine, stringent regulations were established, compelling the mine owner to work at least four paid workmen in "some exterior or interior work of real utility" for eight months during each year, counting from the day of his coming into possession.

*Royalties.*—A certain percentage of the product of mines was payable to the government the amount of which varied at different periods.

§ 14. **Authorities consulted.**—In the preparation of the foregoing chapter, the author has availed himself of the painstaking labor of jurists and writers on the subject of foreign mining laws, whose works should be specially mentioned. That due credit may be given, and to the end that those desiring to pursue the study of comparative mining jurisprudence beyond what we consider the legitimate scope of this treatise, may be invited into broader fields of investigation, we take pleasure in here enumerating the various authors whose works we have been so fortunate as to possess.

The monographs of Dr. Rossiter W. Raymond, at present secretary of the American institute of mining engineers, scientist, scholar, and lawyer, one of the ablest living contributors not only to the literature of mining jurisprudence, but to mining subjects generally, have been freely consulted. Such of the productions of his pen as deal directly with the subject of foreign mining laws are, his treatise on "Relations of Governments to Mining," forming part II. of his first report as commissioner of mining statistics,<sup>1</sup> and his contribution to Lalor's "Cyclopædia of Political Science," under the title of "*Mines*."<sup>2</sup>

General H. W. Halleck's introduction to "De Fooz on the Law of Mines,"<sup>3</sup> and Hon. Gregory Yale's "Mining Claims and Water Rights"<sup>4</sup> contain valuable contributions on the subject of foreign mining systems, and have been freely consulted.

Arundel Rogers, Esq., in his work on the "Law of Mines, Minerals, and Quarries,"<sup>5</sup> devotes considerable space to a discussion of foreign systems, including a chronological review of legislation on mining subjects in the United States.

From the standpoint of practical utility, the recent work of Oswald Walmesley, Esq., barrister at law of Lincoln's Inn, "Guide to the Mining Laws of the World,"<sup>6</sup> is commended.

Mr. Walmesley has gathered and grouped together a vast amount of valuable authentic information. While written principally as a guide to persons seeking mining investments in foreign countries, it is the work of a trained lawyer, and valuable to the professional student of comparative mining jurisprudence.

Other authorities which have been consulted on this subject will be found in the notes.

<sup>1</sup> Mineral Resources, 1869, pp. 173-256. <sup>4</sup> San Francisco, 1867.

<sup>2</sup> 1883, vol. ii., pp. 844-854. <sup>5</sup> London, 1876.

<sup>3</sup> San Francisco, 1860. <sup>6</sup> London, 1894.

## CHAPTER II.

### LOCAL STATE SYSTEMS.

§ 18. Classification of states.

§ 19. First group.

§ 20. Second group.

§ 21. Third group.

§ 22. Limit of state control after patent.

**§ 18. Classification of states.**—Many of the states of the union have enacted laws governing the mining industry. These states may be grouped into three classes:—

(1) Those states wherein the federal government acquired no public mineral land, and for that reason were not included in the scope of federal mining legislation;

(2) Those states which are public land states, but are exempted from the operation of the congressional mining laws, either for the reason that the mineral lands therein were sold under special laws prior to the enactment of general laws on the subject of mining, or because congress has by later laws in terms excluded them from the operation of these general laws;

(3) Those public land states and territories wherein the federal system is in full force, and wherein supplemental state and territorial legislation is authorized by the expressed terms of the federal laws.

**§ 19. First group.**—In states falling within the first group, such as the thirteen original states, and those carved out of the territory claimed by them, it is quite manifest that no federal legislation touching mining tenures is possible, and that such regulations as are found must be sought in the laws of the several states. The individual states



comprised within this group, being the paramount proprietors of their mineral lands, could alone prescribe the terms upon which mining rights could be acquired thereon. To this class the states of Tennessee and Texas may be added.

In most of these states there is no distinction between the method of acquiring mineral lands and lands that do not fall within this designation. Some of them, particularly those where coal mining is carried on extensively, have elaborate systems in the nature of police regulations, prescribing the manner in which mines shall be worked, providing for their official inspection, proper ventilation, means of escape in case of accident, and provisions looking to the protection of the miners. Pennsylvania,<sup>1</sup> Kentucky,<sup>2</sup> West Virginia,<sup>3</sup> and Tennessee<sup>4</sup> have more or less elaborate codes, confined, however, to regulating the manner of working the mines. No mining legislation of a general character is found in Delaware, New Jersey, Georgia, Connecticut, Massachusetts, North Carolina, Rhode Island, Vermont, or Maine.

Some of the states, such as Massachusetts,<sup>5</sup> Kentucky, and Tennessee,<sup>6</sup> regard the industry of mining as in the nature of a public use, and permit private property to be condemned for purposes of rights of way and drainage.

South Carolina has enacted some special legislation affecting phosphatic deposits in navigable waters, marshes, and creeks belonging to the state, and providing for a system by which licenses may be granted to extract them upon payment of royalties to the state;<sup>7</sup> but no distinction is made between the method of acquiring mineral lands and other lands, or in the tenures by which they are held. Of all the states found within the first group, New York<sup>8</sup>

<sup>1</sup> Brightley's Purdon's Digest, 1894, vol. xi., pp. 1340 to 1386.

<sup>2</sup> Laws 1891-92, p. 54; 1894, p. 55; Gen. Stats. 1887, p. 267; *Id.*, p. 1130.

<sup>3</sup> Laws 1893, ch. 22, p. 54; 1891, ch. 15, p. 22; 1891, ch. 35, p. 60; 1891, ch. 82, p. 209, 1889-90, p. 161.

<sup>4</sup> Laws 1887, ch. 206, p. 346; Code 1884, p. 75, 327 *et seq.*; Laws 1891, p. 293; Whitney's Land Laws, p. 335.

<sup>5</sup> Pub. Stats., 1882, ch. 189, §§ 19 to 28.

<sup>6</sup> Code 1884, § 1864, p. 329.

<sup>7</sup> Rev. Stats. South Carolina, 1893-94, vol. i., pp. 36-38.

<sup>8</sup> Laws 1894, vol. i., ch. 317, p. 189 *et seq.*; *Id.*, vol. ii., ch. 745, p. 1832.



and Texas<sup>1</sup> are the only ones having anything like a general mining code.

*New York.*—New York has from the earliest period of its history asserted its ownership of mines of the precious metals by virtue of its sovereignty. A history of the legislation in this state would serve no useful purpose in this treatise. Briefly stated, the existing laws contain the following declaration as to the state's ownership.

The following mines are the property of the people of the state in their right of sovereignty:—

(1) All mines of gold and silver discovered or hereafter to be discovered;

(2) All mines of other metals discovered, or upon lands owned by persons not being citizens of the United States;

(3) All mines of other metals discovered upon lands owned by a citizen of the United States, the ore of which on an average shall contain less than two equal third parts in value of copper, tin, iron, and lead, or any of these metals;

(4) All mines and all minerals and fossils, discovered, or hereafter to be discovered, upon lands belonging to the state.<sup>2</sup>

It is not our purpose to either analyze or criticise this law,<sup>3</sup> but simply to outline it. As will be observed, its fundamental theory bears a striking analogy with that of the civil law. Citizens of the state discovering mineral upon lands of the state are required to give notice of the discovery to the secretary of state. The simple filing of this notice inaugurates the right to work. There are no statutory provisions fixing the area or extent of the property which may be worked under this notice; nor is there any direction as to marking of boundaries. The discoverer

<sup>1</sup> Sayle's Civil Digest, Sup. 1888-93, tit. 64b, art. 3361b.

<sup>2</sup> Laws 1894, vol. i., ch. 317, p. 589.

<sup>3</sup> For review of the New York mining laws, see Dr. Raymond's monographs—Trans. Am. Inst. M. E., vol. xvi., p. 770, and vol. xxiv., p. 712; Eng. & Min. Journal, vol. lviii., p. 560.

is exempted from paying any royalty for the term of twenty-one years, and after the end of that period he or his personal representative shall be preferred in any contract for the working of such mine made with the legislature or under its authority.

Mining corporations are authorized to condemn property for the purpose of mining easements, under certain conditions and restrictions.

*Texas.*—Texas has a general mining law,<sup>1</sup> which in the main follows the congressional laws, with the exception that no extralateral right is conferred, and the miner is not granted anything beyond vertical planes drawn through his surface boundaries. Patents are issued if applied for within five years, the price being twenty-five dollars per acre for lode claims, and ten dollars per acre for placer claims. Prior to patent, one hundred dollars must be expended on each claim annually, and fifty dollars per claim per annum must be paid to the state treasurer, the amount of such payments to be credited upon the purchase price when patent is obtained. The state after patent exacts no royalty, and does not concern itself with the manner of working the mines. After title passes from the state, the tenure by which mining property is held is the same as other property.

§ 20. **Second group.**—In the states of Arkansas, Illinois, Missouri, Iowa, Michigan, Minnesota, and Wisconsin, lands of the government containing the baser metals (lead and copper) were ordered sold under special laws prior to the discovery of gold in California. The precious metals are not found in any appreciable quantities in any of these states. By acts of congress, passed at different times, Alabama,<sup>2</sup> Michigan, Minnesota, Wisconsin,<sup>3</sup> Kansas, and Missouri<sup>4</sup> were excepted from the operation of the federal mining laws.

<sup>1</sup> Sayle's Civil Digest Sup., tit. 64b., art. 3381b.

<sup>2</sup> 22 Stats. at Large, p. 487.

<sup>3</sup> 19 Stats. at Large, p. 52.

<sup>4</sup> 17 Stats. at Large, p. 465.

The extent of the power of these states over the mining industry is limited to regulating the manner in which mines may be worked with regard to the safety of the miners; that is to say, police regulations such as are found in Pennsylvania.<sup>1</sup> This power has been exercised in Illinois,<sup>2</sup> Iowa,<sup>3</sup> Kansas,<sup>4</sup> and Missouri,<sup>5</sup> where codes more or less elaborate are found. With these exceptions, there is no mining legislation of any importance found in any of the states in this group.

§ 21. **Third group.**— This group includes what may be generally called the precious-metal-bearing states and territories, and will be fully considered when dealing generally with the federal system, as by that system supplemental state and territorial legislation is permissive. This local legislation, where found, is essentially a part of the national law, as administered in the respective local jurisdictions. These state and territorial laws, to a large extent, supplant the local rules and customs, and in some of the states and territories are quite elaborate, embodying so many elements that they demand individual treatment in another portion of this work, after we shall have laid the foundation therefor.

It may be of historical interest to note that it was at one time held in California that the mines belonged to the state, in virtue of her sovereignty, and that the state alone could authorize them to be worked. The doctrine was asserted that the several states of the union, in virtue of their respective sovereignties, were entitled to the *jura regalia* which pertained to the king at common law.<sup>6</sup>

In support of this view, the rules followed in the states of New York and Pennsylvania were cited. Of course, in

<sup>1</sup> Brightley's Purdon's Digest, 1894, vol. ii., p. 1340 *et seq.*

<sup>2</sup> Starr & Curtiss's Revision, 1885, p. 1618 *et seq.*; Starr & Curtiss's Sup., 1885-92, p. 872; Laws 1895, p. 252 *et seq.*

<sup>3</sup> Acts 1894, p. 95; Acts 1890, p. 71; Revision 1888, § 2449 *et seq.*

<sup>4</sup> Gen. Stats. 1889, vol. i., § 3835 *et seq.*; Laws 1895, p. 312; Laws 1893, p. 270.

<sup>5</sup> Rev. Stats. 1889, vol. ii., § 7031 *et seq.*; Laws 1895, p. 225.

<sup>6</sup> Hicks v. Bell, 3 Cal. 219.

those two states the national government owned no lands. The primary ownership was in the states, and not in the general government. Therefore, the states were at liberty to determine for themselves the policy to be pursued with reference to their own property.

This early California doctrine was subsequently repudiated.<sup>1</sup>

§ 22. **Limit of state control after patent.**— It may not be out of place to here remark that the government of the United States does not concern itself with mining lands or the mining industry after it parts with the title. This title vests in the patentee absolutely, to the extent of the property granted. No royalties are reserved; nor is any governmental supervision (except, perhaps, in the isolated case of hydraulic mines in California) attempted. Upon the issuance of the deed of the government, the mineral land becomes private property, subject to the same rules as other property in the state with reference to the transfer, devolution by descent, and all other incidents of private ownership prescribed by the laws of the state. The federal law remains, of course, a muniment of title; but beyond that it possesses no potential force. Its purpose has been accomplished, and, like a private vendor, the government loses all dominion over the thing granted. The state may not increase, diminish, nor impair the rights conveyed by a federal patent, but may, of course, and frequently does, exercise its police power and regulate the manner of working the mines, in the same manner that it might regulate any other industry. Briefly stated, property in mines, once vested absolutely in the individual, becomes subject to the same rules of law as other real property within the state.

<sup>1</sup> *Moore v. Smaw*, 17 Cal. 109, 217; *Doran v. C. P. R. R.*, 24 Cal. 245.



## **TITLE II.**

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### **HISTORICAL REVIEW OF THE FEDERAL POLICY AND LEGISLATION CONCERNING MINERAL LANDS.**

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#### **CHAPTER**

- I. INTRODUCTORY—PERIODS OF NATIONAL HISTORY.**
- II. FIRST PERIOD: FROM THE FOUNDATION OF THE  
GOVERNMENT TO THE DISCOVERY OF GOLD IN  
CALIFORNIA.**
- III. SECOND PERIOD: FROM THE DISCOVERY OF GOLD IN  
CALIFORNIA UNTIL THE PASSAGE OF THE LODE  
LAW OF 1866.**
- IV. THIRD PERIOD: FROM THE PASSAGE OF THE LODE  
LAW OF 1866 TO THE ENACTMENT OF THE GEN-  
ERAL LAW OF MAY 10, 1872.**
- V. FOURTH PERIOD: FROM THE ENACTMENT OF THE  
LAW OF 1872 TO THE PRESENT TIME.**
- VI. THE FEDERAL SYSTEM.**



## CHAPTER I.

### INTRODUCTORY.

§ 25. Introductory — Periods of national history.

§ 25. **Introductory — Periods of national history.**— Positive law is the result of social evolution. Its development keeps pace with the intellectual and industrial progress of a nation. The history of a nation's laws is the history of the economic forces of which they are but the resultants, or, as aptly stated by a distinguished writer, "Each nation has evolved its existing economy as the outcome of its history, character, environment, institutions, and general progress."

A brief historical review of the growth of our nation, its policy and legislation on the subject of mineral lands, and the discovery and development of its mineral resources, will materially aid us in arriving at a proper interpretation of the existing system of laws governing the acquisition and enjoyment of property rights and privileges on the public mineral domain of the United States.

This branch of national history logically divides itself into four distinct periods, marked either by the occurrence of important events or emphasized by a distinctive change of national policy. These periods may be defined as follows:—

*First*—From the foundation of the government to the discovery of gold in California.

*Second*—From the discovery of gold in California until the passage of the lode law of 1866.

*Third*—From the passage of that law to the enactment of the general law of May 10, 1872.

*Fourth*—From that event to the present time.



## CHAPTER II.

### FIRST PERIOD: FROM THE FOUNDATION OF THE GOVERNMENT TO THE DISCOVERY OF GOLD IN CALIFORNIA.

§ 28. Original nucleus of national domain.	§ 32. No development of copper mines until 1845.
§ 29. Mineral resources of the territory ceded by the States.	§ 33. The Louisiana purchase and legislation concerning lead mines.
§ 30. First congressional action on the subject of mineral lands.	§ 34. Message of President Polk.
§ 31. Reservation in crown grants to the colonies.	§ 35. Sales of land containing lead and copper under special laws.
	§ 36. Reservation in pre-emption laws.

**§ 28. Original nucleus of the national domain.**—The national government acquired no rights of property within the present boundaries of the thirteen original states, nor in the states of Vermont, Kentucky, Maine, or West Virginia, which were severally carved out of territory originally forming a part of some of the original states.

The first acquisition of national domain which became subject to the disposal of congress was by cessions of territory claimed by seven of the original states. These cessions, commencing with that by the state of New York (March 1, 1781), and ending with that of Georgia (April 24, 1802), brought within the jurisdiction and control of the federal government all that portion of the present area of the United States now comprising the states of Tennessee, Illinois, Indiana, Ohio, Michigan, Wisconsin, those portions of Alabama and Mississippi lying north of the thirty-first parallel, and that portion of Minnesota lying east of the

Mississippi river. This area, with the exception of Tennessee (in which the public lands were practically absorbed by the claims of North Carolina, the surplus being subsequently ceded to the state),<sup>1</sup> constituted the original nucleus of our national domain.<sup>2</sup>

§ 29. **Mineral resources of the territory ceded by the states**—In this period of our national history but little was known of the mineral resources of the country, and economic minerals were but little known or used.<sup>3</sup>

Gold had been found in moderate quantities in use among the Indian tribes of the present southern states, and the Spaniards, under the leadership of De Soto, were supposed to have discovered gold in North and South Carolina and Georgia; but the existence of this royal metal in any considerable quantity was purely legendary.<sup>4</sup>

Copper was known to exist in the Lake Superior region. The Jesuit priests had made extensive explorations on the upper peninsula, and had given glowing accounts of the abundance of copper there found. Other explorers confirmed these discoveries, and brought back legends of gold and precious stones.<sup>5</sup>

In 1771, when this region had passed from the dominion of France, a company was organized in London, the Duke of Gloucester being one of the incorporators, to mine copper on the Ontonagon river. What little metal was obtained was shipped to England; but nothing resulted from the venture.<sup>6</sup>

This was practically the extent of public information upon the subject at the time congress passed its first ordinance on the subject of mineral lands.

<sup>1</sup> Public Domain, p. 83.

<sup>2</sup> Florida was ceded to us in 1821 by Spain (Public Domain, 116), but until a very recent period was not known to contain any substances commercially classed as mineral. Its phosphate deposits on public lands are subject to the general mining laws of congress.

<sup>3</sup> Public Domain, p. 306.

<sup>4</sup> Century of Mining—Trans. Am. Inst. M. E., vol. v., p. 106.

<sup>5</sup> *Id.*, p. 109.

<sup>6</sup> Trans. Am. Inst. M. E., vol. xix., p. 679.

§ 30. **First congressional action on the subject of mineral lands.**—The definitive treaty of peace between Great Britain and the United States, concluded at Paris, September 3, 1783, practically settled our northern boundary, although this was a subject of controversy for several years after. When the lake region became subject to the unquestioned jurisdiction of the United States, the territory was in the occupancy of the Indians, and no settlements were attempted in that section until a much later period.

The first legislative declaration of congress with reference to mineral lands is found in the ordinance of May 20, 1785, entitled "An ordinance for ascertaining the mode of disposing of lands in the western territory."

Under this ordinance surveyors were to be appointed from each state, to act under the direction of the geographer. The territory was to be divided into townships six miles square, and these townships subdivided into sections one mile square (six hundred and forty acres). Meridian and base lines were to be established, and the rectangular system of surveys was adopted, which has ever since been in general use.

In making these surveys, the surveyors were required to note all mines, salt licks, and mill seats that should come to their knowledge.

Reservations were made of four sections in each township for the use of the United States, one section (the sixteenth) for the maintenance of schools in that township, and a certain proportion, equal to one seventh of all the lands surveyed, was to be distributed to the late continental army.

There was also reserved, to be sold or otherwise disposed of as congress should thereafter direct, one third of all gold, silver, lead, and copper mines.

The unreserved sections or lots were to be allotted to the several states, according to their *pro rata*, and the lands thus allotted were to be sold at public vendue by the commissioners of the loan offices of the several states, by whom

deeds were to be given. These deeds were to contain a clause, "excepting therefrom and reserving one third part of all gold, silver, lead, and copper mines within the same."<sup>1</sup>

Considering the then state of public information as to the mineral resources of the newly acquired national domain, it is manifest that the reservations in the ordinance were not based upon any economic reasons. The impression undoubtedly existed, as it had from the period of the earliest discoveries and explorations in America, that the newly acquired territory was rich in precious and economic metals, and that some day they might prove a source of national revenue. But it is apparent that the policy of thus reserving a portion of this class of lands was but an adaptation of the system pursued by the mother country in dealing with her colonies, and following the example set by the crown, to whose rights the American confederation had succeeded.

**§ 31. Reservation in crown grants to the colonies.—**

In almost all of the crown grants to the colonies, clauses were inserted reserving to the sovereign a certain fixed proportion of the royal metals discovered.

The charter of North Carolina (1584), granted to Sir Walter Raleigh by Elizabeth, contained the following reservation:—

"Reserving always to us, our heirs and successors, for all services, duties, and demands the fifth part of all the ore of gold and silver that from time to time, and at all times after such discovery, subduing, and possessing, shall be there gotten and obtained."<sup>2</sup>

This form of reservation, is found, with few exceptions, in all of the succeeding grants, viz: the three charters of Virginia (1606, 1609, 1611),<sup>3</sup> which also reserved one fifteenth of all copper; Massachusetts bay (1629);<sup>4</sup> the grant

<sup>1</sup> Journals of Congress, vol. x., p. 118.

<sup>2</sup> Charters and Constitutions, part ii., p. 1380.

<sup>3</sup> *Id.*, part ii., p. 1890, 1898, 1904.

<sup>4</sup> *Id.*, part i., p. 932.

of New Hampshire by the president and council of New England to Captain John Mason (1629—confirmed 1635);<sup>1</sup> the charter of Maryland to Lord Baltimore (1632), upon whom was imposed the additional burden of rendering annually two Indian arrows;<sup>2</sup> the grant of the province of Maine to Sir Ferdinando Gorges (1639);<sup>3</sup> Rhode Island and Providence plantations (1643);<sup>4</sup> Connecticut (1632);<sup>5</sup> the charter of Carolina, granted by Charles the Second to the Earl of Clarendon, Duke of Albermarle, and others (1663, 1665), reserved a royalty of one fourth of the royal metals and the annual payment of twenty marks.<sup>6</sup>

The grant of the province of Maine by Charles the Second to James Duke of York (1664), was an exception.<sup>7</sup> In this grant, “our dearest brother covenants and promises “to yield and render to his sovereign annually forty beaver “skins when they shall be demanded,” and in return received a grant of all the mines and minerals.

William Penn was required to yield and pay “two beaver skins, to be delivered at our castle of Windsor on the first day of January of every year,” in addition to the one fifth part of all gold and silver ores.

It was but natural that the United States in its first dealings with its public lands should provide for similar reservations. It was the force of precedent, rather than considerations of public and economic policy, that suggested those provisions of the ordinance reserving a part of the mineral lands for the use of the government.

**§ 32. No development of copper mines until 1845.—** By resolution of April 16, 1800, congress authorized the president to employ an agent to collect information relative to copper mines on the south side of Lake Superior, and “to ascertain whether the Indian title to such lands as “might be required for the use of the United States, in case

<sup>1</sup> Charters and Constitutions, part ii., pp. 1271, 1274.

<sup>2</sup> *Id.*, part i., p. 812.

<sup>5</sup> *Id.*, part i., p. 257.

<sup>3</sup> *Id.*, part i., p. 776.

<sup>6</sup> *Id.*, part ii., p. 1383.

<sup>4</sup> *Id.*, part ii., p. 1602.

<sup>7</sup> *Id.*, part i., p. 784.

"they should deem it expedient to work the said mines, " had been extinguished."

It is a matter of history that the Indian title was not extinguished until the treaty with the Chippewas in 1843, and it was not until 1845 that systematic mining in the copper regions was commenced. In 1845, the total production of copper in the United States was estimated at one hundred tons.<sup>1</sup> The total production from 1776 to 1851 is estimated at six thousand tons.<sup>2</sup> It is needless to remark that the government never deemed it expedient to embark in mining enterprises on its own account in any portion of its public domain.

§ 33. **The Louisiana purchase and legislation concerning lead mines.**—In 1803, the territory acquired by purchase from France, commonly called "the Louisiana purchase," added over a million square miles to the national domain, embracing parts of Alabama and Mississippi, the states of Louisiana, Arkansas, Missouri, Iowa, Kansas (except a portion in the southwest corner), Nebraska, all of Colorado east of the Rocky mountains and north of the Arkansas river, Oregon, North and South Dakotas, Montana, Idaho, Washington, a part of Wyoming, and the Indian territory.

Lead mining was begun in what is now the state of Missouri as early as 1720, while that section of country belonged to France, and under the patent granted to Law's famous Mississippi colony. Mine La Motte was one of the earliest discoveries (1702), and has been in operation at intervals ever since.<sup>3</sup> In 1788, Dubuque obtained from the Indians the grant under which he mined.<sup>4</sup>

The total production of lead in Missouri from 1720 to 1803 is estimated at sixteen thousand and ninety-five tons.<sup>5</sup>

<sup>1</sup> Mineral Industry, vol. i., p. 108.

<sup>2</sup> Trans. Am. Inst. M. E., vol. xi., p. 8.

<sup>3</sup> Century of Mining — Trans. Am. Inst. M. E., vol. v., p. 170.

<sup>4</sup> *Id.*, p. 170.

<sup>5</sup> Mineral Industry, vol. i., p. 387.

From 1776 to 1824, it is estimated at four thousand four hundred and thirty-two tons.<sup>1</sup>

On March 3, 1807, congress passed a law wherein it was provided:—

“That the several lead mines in the Indiana territory  
“ . . . shall be reserved for the future disposal of the  
“ United States; and any grant which may hereafter be  
“ made for a tract of land containing a lead mine which  
“ had been discovered previous to the purchase of such tract  
“ from the United States shall be considered fraudulent and  
“ null, and the President of the United States shall be and  
“ is hereby authorized to lease any lead mine which has  
“ been or may hereafter be discovered in the Indiana terri-  
“ tory for a term not exceeding five years.”<sup>2</sup>

This legislation inaugurated the policy of the United States of leasing mineral lands.<sup>3</sup> These leases were to be given under the supervision of the war department. Where given, they covered tracts, at first three miles, afterwards one mile, square, and bound the lessees to work the mines with due diligence and return to the United States six per cent. of all the ores raised.

No leases were issued under the law until 1822, and but a small quantity of lead was raised until 1826, from which time the production began to increase rapidly.<sup>4</sup>

Hon. Abram S. Hewitt<sup>5</sup> gives the following interesting summary of the practical operation of this law and the policy inaugurated by it:

“For a few years the rents were paid with tolerable reg-  
“ ularity, but after 1834, in consequence of the immense  
“ number of illegal entries of mineral land at the Wiscon-  
“ sin land office, the smelters and miners refused to make  
“ any further payments, and the government was entirely  
“ unable to collect them. After much trouble and expense,  
“ it was, in 1847, finally concluded that the only way was  
“ to sell the mineral land and do away with all reserves of

<sup>1</sup> Trans. Am. Inst. M. E., vol. v., p. 194.

<sup>2</sup> 2 Stats. at Large, p. 448, § 5.

<sup>3</sup> Public Domain, p. 307.

<sup>4</sup> Century of Mining—Trans. Am. Inst. M. E., vol. v., p. 180.

<sup>5</sup> In an address before the Am. Institute of Mining Engineers.



"lead or any other metal, since they had only been a source of embarrassment to the department.

"Meanwhile, by a forced construction (afterward declared invalid) of the same act, hundreds of leases were granted to speculators in the Lake Superior copper region, which was from 1843 to 1846 the scene of wild and baseless excitement. The bubble burst during the latter year; the issue of permits and leases was suspended as illegal, and the act of 1847, authorizing the sale of the mineral lands and a geological survey of the district, laid the foundation of a more substantial property."<sup>1</sup>

§ 34. **Message of President Polk.**—President Polk, in his first message to congress (December 2, 1845) made the following special mention of these lands and the system of leasing them authorized by the act of March 3, 1807:—

"The present system of managing the mineral lands of the United States is believed to be radically defective. More than a million acres of the public lands supposed to contain lead and other minerals, have been reserved from sale, and numerous leases upon them have been granted to individuals upon a stipulated rent. The system of granting leases has proved to be not only unprofitable to the government, but unsatisfactory to the citizens who have gone upon the lands, and must, if continued, lay the foundation of much future difficulty between the government and the lessees. According to the official records, the amount of rents received by the government for the years 1841, 1842, 1843, and 1844, was \$6,354.74, while the expenses of the system during the same period, including salaries of the superintendents, agents, clerks, and incidental expenses, were \$26,111.11, the income being less than one fourth of the expense. To this pecuniary loss may be added the injury sustained by the public in consequence of the destruction of timber, and the careless and wasteful manner of working the mines. The system has given rise to much litigation between the United States and individual citizens, producing irritation and excitement in the mineral region, and involving the government in heavy additional expenditures. It is believed that similar losses and embarrassments will continue to occur while the present system of leasing these lands remains unchanged. These lands are

<sup>1</sup>Century of Mining—Trans. Am. Inst. M. E., vol. v., p. 181.



“ now under the superintendence and care of the war department, with the ordinary duties of which they have no proper or natural connection. I recommend the repeal of the present system, and that these lands be placed under the superintendence and management of the general land office as other public lands, and be brought into market and sold upon such terms as congress in its wisdom may prescribe, reserving to the government an equitable percentage of the gross amount of mineral product, and that the pre-emption principle be extended to resident miners, and settlers upon them, at the minimum price which may be established by congress.”

§ 35. **Sales of land containing lead and copper under special laws.**—The first sale of mineral lands was that of the reserved lead mines and contiguous lands in the state of Missouri, under the act of March 3, 1829.<sup>1</sup> They were to be exposed for sale as other public lands, at two dollars and fifty cents per acre; but lead and other mineral lands on the public domain, elsewhere than in Missouri, were still reserved from sale.

The act of July 11, 1846,<sup>2</sup> ordered the reserved lead mines and contiguous lands in Illinois, Arkansas, and the territories of Wisconsin and Iowa, to be sold as other public lands, after six months' public notice, following the Missouri act of 1829, with the addition of the provision that the lands should be offered and held subject to private entry before pre-emptions were allowed. The register and receiver were to take proof as to character of lands, whether mineral (*i. e.* containing lead) or agricultural.

The act of March 1, 1847,<sup>3</sup> opened for sale lands in the Lake Superior land district, state of Michigan, containing copper, lead, or other valuable ores, after geological examination and survey, and provided that there should be public advertisement for six months, and then public sale at not less than five dollars per acre, those not disposed of at public auction to be subject to private sale at five dollars per acre.

<sup>1</sup> 4 Stats. at Large, p. 364.

<sup>2</sup> 9 Stats. at Large, p. 146.

<sup>3</sup> 9 Stats. at Large, p. 37.

The act of March 3, 1847,<sup>1</sup> ordered sale of mineral lead land in Chippewa district, in Wisconsin.

It will be thus observed that from the period of 1785 to the discovery of gold in California, in 1848, the legislation of the congress of the United States as to survey, lease, and sale of mineral lands had been for lead, copper, and other base metals, and applied to the territory in the region of the great lakes, in the now states of Michigan, Wisconsin, Minnesota, Iowa, and Illinois, and the present state of Missouri. Under these various laws the copper, lead, and iron lands of the above mentioned regions were sold.<sup>2</sup>

§ 36. **Reservation in pre-emption laws.** — During this period numerous laws were passed granting pre-emption rights to settlers upon the public lands. These laws, as a general rule, excepted from their operation lands previously reserved from sale by former acts; but no specific reservation of mineral lands, or lands containing mines, was incorporated into any of them until the pre-emption act of September 4, 1841, was passed. This act<sup>3</sup> contained the provision that "no lands on which are situated any known salines or "mines shall be liable to entry under and by virtue of the "provisions of this act." It also embodied the limitation that its terms should not extend to lands reserved for salines, "or other purposes"

At the time of the passage of this act, the only mines that could have been in contemplation of congress were those of lead and other base metals in the region of the Mississippi valley and the copper mines in the regions of the great lakes

As to salines, the policy of the government since the acquisition of the northwest territory, and the inauguration of our land system to reserve salt springs from sale, has been uniform.<sup>4</sup>

<sup>1</sup> 9 Stats. at Large, p. 179. <sup>2</sup> Pub. Domain, p. 319. <sup>3</sup> 5 Stats. at Large, p. 453, § 10.

<sup>4</sup> See Morton v. State of Nebraska, 88 U. S. 660, wherein legislation as to salines is fully reviewed.

## CHAPTER III.

### SECOND PERIOD: FROM THE DISCOVERY OF GOLD IN CALIFORNIA UNTIL THE PASSAGE OF THE LODGE LAW OF 1866.

§ 40. Discovery of gold in California and the Mexican cession.	§ 46. Local rules as forming part of present system of mining law.
§ 41. Origin of local customs.	§ 47. Federal legislation during the second period.
§ 42. Scope of local regulations.	§ 48. Executive recommendations to congress.
§ 43. Dips, spurs, and angles of lode claims.	§ 49. Coal land laws — Mining claims in Nevada — Sutro tunnel act.
§ 44. Legislative and judicial recognition by the state.	
§ 45. Federal recognition.	

**§ 40. Discovery of gold in California and the Mexican cession.**—Commodore Sloat raised the American flag at Monterey, July 7, 1846. Marshall discovered gold at Coloma in January, 1848. The treaty of Guadalupe Hidalgo was concluded February 2, exchanged May 30, and proclaimed July 4, 1848. This treaty added to the national domain an area of more than half a million square miles, embracing the states of California, Nevada, Utah, the territories of Arizona (except the Gadsden purchase of 1853) and New Mexico west of the Rio Grande and north of the Gadsden purchase, and the state of Colorado west of the Rocky mountains, and the southwestern part of Wyoming.<sup>1</sup>

The discovery of gold and reports of its extensive distribution throughout the foothill regions of the Sierra

<sup>1</sup>The Gadsden purchase added to the public domain 45,535 square miles, and formed part of the present territories of Arizona and New Mexico.

Nevadas brought to the shores of the Pacific a tide of immigration from all parts of the world. All nationalities, creeds and colors were soon represented and swarmed into the mineral regions of the golden state, which thenceforward became a beehive of gold-seekers, with their attendant camp-followers.

**§ 41. Origin of local customs.**— No system of laws had been devised to govern the newly acquired territory. By virtue of the treaty, the title to the lands containing the newly discovered wealth was vested in the federal government.

Until March 3, 1849, no attempt was made by congress to extend the operation of any of the federal laws over California, and on this date the revenue laws only were so extended<sup>1</sup>

Until the admission of the state into the union, California was governed by the military authorities. Colonel Mason, on February 12, 1848, issued a proclamation as military governor, wherein he attempted to put an end to local uncertainty on this delicate subject of international law, by decreeing that "From and after this date the Mexican laws and customs now prevailing in California relative to the denouncement of mines are hereby abolished."<sup>2</sup>

Whether the power to abolish laws if they had a potential existence was confided to a military commandant or not, the force of the proclamation was recognized for the time, and the mining population found itself under the necessity of formulating rules for the government of the several mining communities, and establishing such regulations controlling the occupation and enjoyment of mining privileges as the exigencies of the case demanded and as the disorganized condition of society required. Of course, these pioneer miners were all trespassers. They had no warrant or license from the paramount proprietor. Colonel Mason, who, in connection with Lieutenant W. T. Sherman,

<sup>1</sup> 9 U. S. Stats. at Large, p. 400; Yale on Mining Claims, p. 16.

<sup>2</sup> Yale on Mining Claims, p. 17.

visited the scenes of the earliest mining operations, thus pictures the situation: —

“The entire gold district, with very few exceptions of grants made some years ago by the Mexican authorities, is on land belonging to the United States. It was a matter of serious reflection with me how I could secure to the government certain rents or fees for the privilege of procuring this gold; but upon considering the large extent of country, the character of the people engaged, and the small scattered force at my command, I resolved not to interfere, but permit all to work freely.”<sup>1</sup>

Thus left to “work freely,” some show of order was brought out of chaos by the voluntary adoption of local rules or general acquiescence in customs whose antiquity dated from the discovery of the “diggings.”

Thus originated a system which, in the course of time, extended throughout the mining regions of the west as new discoveries were made, and subsequently came to be recognized as having the force of established law.

Naturally, these regulations varied in the different districts as local conditions varied.

§ 42. **Scope of local regulations.**—Some of the primitive codes were quite comprehensive in their scope, and undertook to legislate generally on the subject of civil rights and remedies, crimes and punishments, as well as providing rules for the possession and enjoyment of mining claims. For example, those adopted at Jacksonville, California, provided for the election of an alcalde, who propounded the law in a court from whose judgment there was no appeal, and wherein the rule of practice was “to conform as nearly as possible to that of the United States; but the forms of no particular state shall be required or adopted.”

To steal a mule or other animal of “draught or burden,” or to enter a tent or dwelling and steal therefrom gold-dust, money, provisions, goods, or other valuables, amounting in value to one hundred dollars or over, was considered a

<sup>1</sup> Public Domain, p. 314.

felony, and on conviction thereof the culprit should suffer "death by hanging."

Should the theft be of property of less value, the offender was to be "disgraced" by having his head and eyebrows close-shaved, and by being driven out of camp.

The willful and premeditated taking of human life was an offense of the same grade as stealing a mule, death being the penalty.

A sheriff was elected to carry judgments into effect, and, generally, to enforce the decrees of the judge and preserve the peace.

When we consider the conditions under which these rules were framed, we can readily appreciate their virtue. Generally speaking, however, the miner's code confined itself to regulating the mining industry. At first the miner's labor and research were confined to surface deposits, and to the banks, beds, and "bars" of the streams—that is, to the claims usually called "placers,"—quartz or lode mining not having been inaugurated until a later period.

A detailed review of the rules and customs adopted and in force in the various districts would serve no useful purpose. A unique collection of them will be found in the interesting and valuable report made by Mr. J. Ross Browne while acting as commissioner of mining statistics.<sup>1</sup>

Mr. Yale, in his work on mining claims and water rights,<sup>2</sup> also gives a full and accurate synopsis of the local mining codes.

The main object of the regulations was to fix the boundaries of the district, the size of the claims, the manner in which the claims should be marked and recorded, the amount of work which should be done to hold the claim, and the circumstances under which the claim was considered abandoned and open to occupation by new claimants.<sup>3</sup>

Of these rules and customs, Mr. Yale thus sums up his views:—

<sup>1</sup> Mineral Resources, 1867, pp. 235-247.

<sup>2</sup> Mining Claims and Water Rights, p. 73.

<sup>3</sup> J. Ross Browne in Mineral Resources, 1867, p. 226.

“ Most of the rules and customs constituting the code  
“ are easily recognized by those familiar with the Mexican  
“ ordinances, the continental mining codes, especially the  
“ Spanish, and with the regulations of the stannary convo-  
“ cations among the tin bounders of Devon and Cornwall,  
“ in England, and the High Peak regulations for the lead  
“ mines in the county of Derby. These regulations are  
“ founded in nature, and are based upon equitable princi-  
“ ples, comprehensive and simple, have a common origin,  
“ are matured by practice, and provide for both surface and  
“ subterranean work, in alluvion, or rock *in situ*. In the  
“ earlier days of placer diggings in California, the large  
“ influx of miners from the western coast of Mexico, and  
“ from South America, necessarily dictated the system of  
“ work to Americans, who were almost entirely inexperi-  
“ enced in this branch of industry. With few exceptions  
“ from the gold mines of North Carolina and Georgia, and  
“ from the lead mines of Illinois and Wisconsin, the old  
“ Californians had little or no experience in mining. The  
“ Cornish miners soon spread themselves through the state,  
“ and added largely, by their experience, practical sense,  
“ and industrious habits, in bringing the code into some-  
“ thing like system. The Spanish-American system which  
“ had grown up under the practical working of the mining  
“ ordinances for New Spain, was the foundation of the rules  
“ and customs adopted. . . . They reflect the matured  
“ wisdom of the practical miner of past ages, and have their  
“ foundation, as has been stated, in certain natural laws,  
“ easily applied to different situations, and were propagated  
“ in the California mines by those who had a practical and  
“ traditional knowledge of them in their varied form in  
“ the countries of their origin, and were adopted, and no  
“ doubt gradually improved and judiciously modified, by  
“ the Americans.”

Halleck aptly states the main source and underlying theory of these local regulations:—

“ The miners of California have generally adopted, as  
“ being best suited to their peculiar wants, the main prin-  
“ ciples of the mining laws of Spain and Mexico, by which  
“ the right of property in mines is made to depend upon  
“ *discovery* and *development*; that is, *discovery* is made the  
“ source of title, and *development*, or *working*, the condition  
“ of the continuance of that title. These two principles



"constitute the basis of all our local laws and regulations respecting mining rights."<sup>1</sup>

§ 43. **Dips, spurs, and angles of lode claims.**-- With respect to lode, or "quartz," claims, as they were then locally termed, in contradistinction to gravel claims, the miners' rules and customs established a rule of property at total variance with the Mexican laws. We refer to the right to work the vein to an indefinite depth, regardless of the occupation or possession of the surface underneath which it might penetrate, and to hold in connection with the main vein, without regard to any inclosing surface boundaries, the "dips, spurs, angles, and variations" of the located vein. Neither the form nor extent of the surface area controlled the rights in the located lode. It did not measure the miners' rights, either to the linear feet upon its course or to follow the dips, angles, and variations of the vein.<sup>2</sup> The lode was the principal thing, and the surface a mere incident.<sup>3</sup>

This departure from the rule of vertical planes drawn through surface boundaries may possibly be traced to the customs then in vogue among the lead miners of Derbyshire with reference to "rake veins."<sup>4</sup>

We find no trace of such an innovation in any other of the contemporaneous mining systems. Under the early German codes of the sixteenth and seventeenth centuries, what may be called an inclined location (*gestrecktfeld*) was sanctioned, which gave the right to follow the vein to an indefinite depth, and to work within planes parallel to the downward course of the vein, thirty feet from the hanging-wall and thirty feet from the foot-wall of the vein, forming a parallelepipedon.<sup>5</sup> But this system had become obsolete long before the discovery of gold in California.<sup>6</sup>

<sup>1</sup> Introduction to De Fooz on the Law of Mines, p. vii.

<sup>2</sup> Eureka Case, 4 Saw. 302-323.

<sup>3</sup> Johnson v. Parks, 10 Cal. 447.

<sup>4</sup> See, *ante*, § 2.

<sup>5</sup> Dr. R. W. Raymond, Mineral Resources, 1869, p. 195.

<sup>6</sup> Klosterman, in his treatise on the Prussian mining laws (Berlin, 1870), says that the abolition of inclined locations was brought about principally by the "interminable lawsuits inherent in the system."



This feature of the miners' rules and customs as adopted in California was embodied in the first mining legislation of congress,<sup>1</sup> and was the basis of what is now termed the extralateral right under the existing system.

A further discussion of this subject will be reserved for a succeeding chapter, where it will be dealt with in connection with the present laws.

**§ 44. Legislative and judicial recognition by the state.**—California was admitted as a state of the union, September 9, 1850. The act of admission contained no reference to mineral lands, and the new state came into existence with the local systems in full force and operation in the mining districts.

The legislature of the state in 1851 gave recognition to the existing conditions and the controlling force of the local system by inserting a provision in the civil practice act to the effect that the "customs, usages, or regulations, when not in conflict with the constitution and laws of the state, shall govern the decision of the action."

As to the effect of this legislative declaration, and generally with reference to the attitude of the state and federal government, upon the subject of mineral lands in California, during this interesting period, the supreme court of California, speaking through Chief Justice Sanderson, thus announced its views:—

"The six hundred and twenty-first section of the practice act provides that 'In actions respecting mining claims  
"proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings  
"embracing such claims; and such customs, usages, or regulations, when not in conflict with the constitution  
"and laws of this state, shall govern the decision of the  
"action.'

"At the time the foregoing became a part of the law of the land, there had sprung up throughout the mining regions of the state local customs and usages by which persons engaged in mining pursuits were governed in the acquisition, use, forfeiture, or loss of mining ground

<sup>1</sup> Act of July 26, 1866.

"(we do not here use the word *forfeiture* in its common-law sense, but in its mining-law sense, as used and understood by the miners, who are the framers of our mining codes). These customs differed in different localities, and varied to a greater or less extent, according to the character of the mines. They prescribed the acts by which the right to mine a particular piece of ground could be secured and its use and enjoyment continued and preserved, and by what non-action on the part of the appropriator such right should become forfeited or lost, and the ground become, as at first, *publici juris* and open to the appropriation of the next-comer. They were few, plain, and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the legislature, not only not to supplant them by legislative enactments, but, on the contrary, to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well-defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results. Having received the sanction of the legislature, they have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form. And it is to be regretted that the wisdom of the legislature in thus leaving mining controversies to the arbitrament of mining laws, has not always been seconded by the courts and the legal profession, who seem to have been too long tied down to the treadmill of the common law to readily escape its thralldom while engaged in the solution of a mining controversy. These customs and usages have, in progress of time, become more general and uniform, and in their leading features are now the same throughout the mining regions of the state, and, however it may have been heretofore, there is no reason why judges or lawyers should wander with counsel for the appellant in this case back to the time when Abraham dug his well, or explore with them the law of agency or the statute of frauds, in order to solve a simple question affecting a mining right; for a more

“convenient and equally legal solution can be found nearer home in the ‘customs and usages of the bar or diggings embracing the claim’ to which such right is asserted or denied.”<sup>1</sup>

Mr. Justice Field, who was the author of the provision of the California civil practice act referred to in the decision above quoted, and who is recognized as the “end of the law” on mining subjects, in speaking for the supreme court of the United States, thus presents his views upon that branch of the law, as to which he was so peculiarly fitted to speak:—

“The discovery of gold in California was followed, as is well known, by an immense immigration into the state, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed and not open by law to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provision being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. *They all recognized discovery, followed by appropriation, as the foundation of the possessor’s title, and development by working as the condition of its retention.* And they were so framed as to secure to all comers within practicable limits absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as

<sup>1</sup> *Morton v. Solambo M. Co.*, 26 Cal. 527.

" respects mining upon the public lands in the state. The  
" first appropriator was everywhere held to have, within  
" certain well-defined limits, a better right than others to  
" the claims taken up; and in all controversies, except as  
" against the government, he was regarded as the original  
" owner, from whom title was to be traced. . . . These  
" regulations and customs were appealed to in controversies  
" in the state courts, and received their sanction; and prop-  
" erties to the value of many millions rested upon them.  
" For eighteen years, from 1848 to 1866, the regulations  
" and customs of miners, as enforced and molded by the  
" courts and sanctioned by the legislation of the state, con-  
" stituted the law governing property in mines and in water  
" on the public mineral lands."<sup>1</sup>

This exposition of the law governing mining rights, as it existed in the early history of the mining industry in the west, leaves nothing to be added by the author. The decision stands as a forensic classic. Judge Field was a part of the history of which he wrote. He served as an alcalde during the chaotic period antedating the admission of California as a state. He served his state in its first legislatures, and was the author of many of its early laws. As chief justice of its supreme court, his was the task to solve the great and overshadowing questions which arose over land titles in a new state coming into the union under peculiar and novel conditions, and he carried to the supreme bench of the United States, not only the practical knowledge acquired by personal contact with the mining communities, but a trained judicial mind.

These local systems are said to have constituted the American common law of mines,<sup>2</sup> and their binding force has been recognized from the beginning by a uniform line of decisions in the state and territorial courts.

§ 45. **Federal recognition.**—The federal judiciary followed the rule thus adopted.<sup>3</sup> Congress has always

<sup>1</sup> *Jennison v. Kirk*, 98 U. S. 453.

<sup>2</sup> *King v. Edwards*, 1 Mont. 235.

<sup>3</sup> *Sparrow v. Strong*, 3 Wall. 97.

recognized their binding force.<sup>1</sup> The land department of the government and the supreme court of the United States have uniformly acted upon the rule that all mineral locations were to be governed by the local regulations and customs in force at the time of the location, when such location was made prior to the passage of any mineral law made by congress.<sup>2</sup>

**§ 46. Local rules as forming part of present system of mining law.**—To a limited extent, local regulations have still a place in our legal system. They are permitted to have controlling force in certain directions and under certain restrictions; but they are gradually becoming superseded by statutory enactments in the various states and territories, which, of course, are but another form of expressing local rules. In many parts of the mining regions the right to supplement congressional laws by the adoption of local codes is not exercised. In other places we still find the right asserted. In this aspect district laws and regulations, as well as state and territorial enactments, form an integral part of the present system, and will be dealt with in their appropriate place. The purpose of this chapter has been largely historical, and enough has been said to show the origin, development, scope, and legal status of local rules to enable us to award them their proper place in the evolution of the existing system.

**§ 47. Federal legislation during the second period.**—On March 3, 1849, congress passed an act creating the department of the interior,<sup>3</sup> and thereupon the supervision of mineral lands was transferred to the general land office in that department.

The act of September 26, 1850,<sup>4</sup> ordered the mineral

<sup>1</sup> *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636; *Chambers v. Harrington*, 111 U. S. 350; *Golden Fleece v. Cable Cons.*, 12 Nev. 313; *King v. Edwards*, 1 Mont. 235.

<sup>2</sup> *Glacier Mt. S. M. Co. v. Willis*, 127 U. S. 471; *Broder v. Natoma Water Co.*, 101 U. S. 274; *Jackson v. Roby*, 109 U. S. 440; *Chambers v. Harrington*, 111 U. S. 350.

<sup>3</sup> 9 Stats. at Large, p. 395.

<sup>4</sup> *Id.*, p. 472.

lands in the Lake Superior district in Michigan to be offered at public sale, in the same manner, at the minimum, and with the same rights of pre-emption, as other public lands, but not to interfere with leased rights.<sup>1</sup>

This is the extent of affirmative action by congress during the second period touching its mineral lands, with the exception of the act providing for a district and circuit court for the district of Nevada, approved February 27, 1865.<sup>2</sup>

Section nine of this act provided:—

“That no possessory action between individuals in any  
“of the courts for the recovery of a mining title or for  
“damages to any such title shall be affected by the fact  
“that the paramount title to the land on which such mines  
“lie is in the United States, but each case shall be ad-  
“judged by the law of possession.”

The same provision is perpetuated in the revised statutes.<sup>3</sup> This act was the first formal recognition by congress of the possessory rights of mineral occupants of the public lands.

In all general laws granting the right of pre-emption to settlers upon public land, mineral lands were reserved from their operation. The act of September 4, 1841, excepts from its operation all lands on which are situated any “known salines or mines.” Whenever, upon the admission of a new state into the union, the provisions of this general pre-emption law were extended to it, this reservation was emphasized, if not enlarged. Thus, by the act of congress passed March 3, 1853, it was provided that all the public lands in the state of California, whether surveyed or unsurveyed, *excepting mineral lands*, should be subjected to the provisions of the act of 1841; and it was further provided that no person should obtain the benefits of the act by a settlement or location on *mineral lands*.

In grants to the several states, and in aid of the construction of railroads, similar reservations were made. The

<sup>1</sup> Public Domain, p. 308.

<sup>2</sup> Rev. Stats., § 910.

<sup>3</sup> 13 Stats. at Large, p. 440.



language of the reservation is not always precisely the same, but there is no departure from the established policy, that mineral lands were uniformly reserved for the use of the United States, or to be disposed of by such special laws as congress might see fit to enact.

In another portion of this treatise the extent and operation of the several excepting clauses contained in the different classes of grants will be considered. Sufficient historical data has here been given justifying the conclusion reached by the courts in announcing the doctrine that, prior to 1866, it had been the settled policy of the government in disposing of the public lands to reserve the mines and mineral lands for the use of the United States. Prior to that date, the uniform reservation of mineral lands from survey, from sale, from pre-emption, and from all grants, whether for railroads, public buildings, or other purposes, fixed and settled the policy of the government in relation to such lands.<sup>1</sup>

§ 48. **Executive recommendations to congress.**—Colonel Mason, in August, 1848, had made a graphic and interesting report to the war department, announcing officially the discovery of gold, giving a glowing account of the extent and richness of the deposits. He recommended the establishment of a mint at San Francisco, the survey of the districts into small parcels, and their sale at public auction to the highest bidder.

On December 2, 1849, President Fillmore, in his annual message to congress, referred to the subject in the following terms:—

“I also beg leave to call your attention to the propriety  
“of extending at an early day our system of land laws,  
“with such modifications as may be necessary, over the  
“state of California and the territories of Utah and New  
“Mexico. The mineral lands of California will, of course,

<sup>1</sup> *Silver Bow M. & M. Co. v. Clarke*, 5 Mont. 378, 410; *Ivanhoe M. Co. v. Keystone Cons. M. Co.*, 102 U. S. 167; *U. S. v. Gratiot*, 14 Peters, 526; *Morton v. State of Nebraska*, 21 Wall. 660; *Jennison v. Kirk*, 98 U. S. 453, 458; *Deffebach v. Hawke*, 115 U. S. 392, 401.

"form an exception to any general system which may be adopted. Various methods of disposing of them have been suggested. I was at first inclined to favor the system of leasing, as it seemed to promise the largest revenue to the government, and to afford the best security against monopolies; but further reflection and our experience in leasing the lead mines and selling lands upon credit, have brought my mind to the conclusion that there would be great difficulty in collecting the rents, and that the relation of debtor and creditor between the citizens and the government would be attended with many mischievous consequences. I therefore recommend that instead of retaining the mineral lands under the permanent control of the government, they be divided into small parcels and sold, under such restrictions as to quantity and time as will insure the best price and guard most effectually against combinations of capitalists to obtain monopolies."

On the day following, Hon. Thomas Ewing, then secretary of the interior, laid before congress an elaborate report concerning the discovery of gold in California, wherein he called attention to the fact that no existing law gave the executive power to deal with the mines or protect them from intrusion, and some legal provision was necessary for their protection and disposition. He recommended a transfer by sale or lease reserving a part of the gold collected as seigniorage.

Nothing, however, came of these recommendations. Senator Fremont, on September 24, 1850, introduced a bill in the United States senate "to make temporary provision for the working and discovery of gold mines and placers in California, and preserving order in the mines," and contemplated a system of licenses to be granted upon payment of a nominal monthly rental. This bill passed the senate but not the house.<sup>1</sup>

§ 49. Coal land laws—Mining claims in Nevada—**Sutro tunnel act.**—There were several minor attempts made to pass a general mining law applicable to the gold regions,

<sup>1</sup> Yale on Mining Claims and Water Rights, pp. 340-349.



but they met with no success. While all admitted something should be done, sentiment was divided on questions of policy.

Laws were passed regulating the sale and disposal of coal lands; one on July 1, 1864,<sup>1</sup> and one on March 3, 1865;<sup>2</sup> and two laws, special and local in their nature—viz: the act of May 5, 1866,<sup>3</sup> concerning the boundaries of the state of Nevada, wherein it was provided that “all possessory  
“rights acquired by citizens of the United States to mining  
“claims discovered, located, and originally recorded, in  
“compliance with the rules and regulations adopted by  
“miners in the Pah Ranagat and other mining districts  
“in the territory incorporated by the provisions of this  
“act into the state of Nevada, shall remain as valid, sub-  
“sisting mining claims; but nothing herein contained shall  
“be so construed as granting a title in fee to any mineral  
“lands held by possessory titles in the mining states and  
“territories.” The second was the Sutro tunnel act, approved July 27, 1866,<sup>4</sup> which granted the right of way and other privileges to Adolph Sutro and his assigns to aid in the construction of a draining and exploring tunnel to the Comstock lode in the state of Nevada. This act conferred upon Sutro the right of pre-emption as to lodes within two thousand feet on each side of the tunnel, cut or discovered by the tunnel, excepting the Comstock lode and other lodes in the actual possession of others. The act also recognized the mining rules and regulations prescribed by the legis-

<sup>1</sup> 13 Stats. at Large, p. 343.

<sup>2</sup> *Id.*, p. 529. These two acts provided for the disposal of coal lands and the sale of town property upon the public domain. The act of March 3, 1865, § 2, contains the following proviso, with reference to the sale of town lots: “*Provided, further*, That where mineral veins are possessed, which  
“possession is recognized by local authority, and to the extent so possessed  
“and recognized, the title to town lots to be acquired shall be subject to  
“such possession and the recognized use thereof. *Provided, however*,  
“that nothing herein shall be construed as to recognize any color of title  
“in possessors for mining purposes as against the government of the  
“United States.”

<sup>3</sup> 14 Stats. at Large, p. 43.

<sup>4</sup> *Id.*, p. 242.

lature of Nevada.<sup>5</sup> On the day following, congress passed the law generally known as the "Lode and Water Law of 1866," to which we will now devote our attention.

<sup>5</sup> Yale on Mining Claims and Water Rights, pp. 351-352.

## CHAPTER IV.

### THIRD PERIOD: FROM THE PASSAGE OF THE LODE LAW OF 1866 TO THE ENACTMENT OF THE GENERAL LAW OF MAY 10, 1872.

§ 53. The act of July 26, 1866.	§ 59. Construction of the act by the land department.
§ 54. Essential features of the act.	§ 60. Construction by the courts.
§ 55. Declaration of governmental policy.	§ 61. Local rules and customs after the passage of the act.
§ 56. Recognition of local customs and possessory rights ac- quired thereunder.	§ 62. The act of July 9, 1870.
§ 57. Title to lode claims.	§ 63. Local rules and customs after the passage of the act.
§ 58. Relationship of surface to the lode.	§ 64. Accession to the national do- main during the third period.

§ 53. **The act of July 26, 1866.**—This act was entitled “An act granting the right of way to ditch and canal owners through the public lands, and for other purposes.” The title gives no clue to the scope of the act. As a matter of fact, the title belonged to another act which had passed the house, and for which the mining act was substituted in the senate, without any attempt to change the title, and in this form passed both houses.<sup>1</sup>

It was the first general law passed under which title might be acquired to any of the public mineral lands within what are known as the precious-metal-bearing states and territories. While most of the provisions of this act have been repealed and superseded by subsequent legislation, it remains a muniment of title to many mining

<sup>1</sup> Yale on Mining Claims and Water Rights, p. 12.

properties, rights to which attached prior to its repeal. To this extent it is still operative.<sup>1</sup>

§ 54. **Essential features of the act.**—No one has ever claimed that this act was a model piece of legislation. It is faulty and crude in the extreme, and the embarrassments surrounding its proper interpretation are still encountered in the courts, where property rights arising under it come in conflict with those acquired under the later laws. Yet the mining communities accepted it as being a step in the right direction. Mr. Yale says of it:—

“As the initial act to the legislation which must necessarily follow, it is more commendable as an acknowledgment of the justice and necessity which dictated it, and its expediency as a means to the advancement of the material interests of the state and nation, than for the perfection of its provisions or their exact adaptation to the accomplishment of the object intended. We must not, however, find fault with the law on account of its imperfections or the introduction of objectionable features in the mode to be followed in acquiring title under it. These imperfections can be remedied, the rights of the parties amplified in many particulars, and the system so changed as to work with more facility than now anticipated.”<sup>2</sup>

It is certainly due to Senators Stewart and Conness, the authors of the bill, to explain that at the time of its passage it was extremely difficult to secure the consideration of any measure touching the subject of mineral lands. Eastern sentiment was divided on questions of governmental policy, and the delegations from the western states were not harmonious. If future experience has shown defects to exist in the law, the authors and friends of the measure are entitled to the gratitude of those engaged in the mining industry for the establishment of at least three important and beneficent principles:—

*First*—That all the mineral lands of the public domain should be free and open to exploration and occupation.

<sup>1</sup> The full text of the act will be found in the appendix.

<sup>2</sup> Yale on Mining Claims and Water Rights, pp. 9-10.

*Second*—That rights which had been acquired in these lands under a system of local rules, with the apparent acquiescence and sanction of the government, should be recognized and confirmed;<sup>1</sup>

*Third*—That titles to at least certain classes of mineral deposits or lands containing them might be ultimately obtained.

§ 55. **Declaration of governmental policy.**—By the first of these provisions, the government, for the first time in its history, inaugurated a fixed and definite legislative policy with reference to its mineral lands. It forever abandoned the idea of exacting royalties on the product of the mines,<sup>2</sup> and gave free license to all its citizens, and those who had declared their intention to become such, to search for the precious and economic minerals in the public domain, and, when found, gave the assurance of at least some measure of security in possession and right of enjoyment. What had theretofore been technically a trespass became thenceforward a licensed privilege, untrammelled by governmental surveillance or the exaction of burdensome conditions. Such conditions as were imposed were no more onerous than those which the miners had imposed upon themselves by their local systems. That such a declaration of governmental policy stimulated and encouraged the development of the mining industry in the west, is a matter of public history.

§ 56. **Recognition of local customs and possessory rights acquired thereunder.**—As was observed in the preceding chapter, the federal government had practically acquiesced from the beginning in the system of local rules established in the various mining districts. That is to say, no overt act was done by the government to overthrow or repudiate the system. No attempt was made to interfere with mining upon the public domain. The process by

<sup>1</sup> *Jennison v. Kirk*, 98 U. S., 453, 458; *Blake v. Butte S. M. Co.*, 101 U. S. 274.

<sup>2</sup> *Ivanhoe M. Co. v. Keystone Cons. M. Co.*, 102 U. S. 167, 173.

which these primitive systems came to be recognized, first by the states, and then by the national government, was natural. When mineral discoveries were made in other territories and states, the system inaugurated in California was adopted to govern and regulate the new mining districts.<sup>1</sup>

Local legislatures and local courts followed the precedent set in California, by enacting and upholding laws confirming the right in the newly discovered mineral districts to establish rules governing the mining industry. As the supreme court of the United States said, before the act of 1866 was passed.—

"We can not shut our eyes to the public history which informs us that under the legislation (state and territorial), not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country."<sup>2</sup>

The unqualified legislative recognition of these local systems was a simple act of justice. Any other course would have involved a practical confiscation of property acquired and developed by the tacit consent of the government. That this act was such unqualified recognition has been abundantly established by the highest judicial authority.<sup>3</sup>

§ 57. **Title to lode claims.**—It may seem strange that the first mining law under which title to mining property could be absolutely acquired was limited in its operation in this direction to lode, or vein, claims. All mineral lands, whatever the forms in which the deposits therein occurred, were thrown open to exploration; but only lode claims could be patented. We are at a loss to understand the reason for this, unless it is accounted for by the state of the

<sup>1</sup> *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 650.

<sup>2</sup> *Sparrow v. Strong*, 3 Wall. 97, 104.

<sup>3</sup> *Jennison v. Kirk*, 98 U. S. 453, 459; *Broder v. Natoma Water Co.*, 101 U. S. 274; *Chambers v. Harrington*, 111 U. S. 350, 352; *Tucomb v. Kirk*, 51 Cal. 288.

industry at the time the act was passed. Placer mining, which had occupied the attention exclusively of the early miners of California, was on the decline, and the quartz, or lode, mining was in the ascendency. The auriferous quartz veins of California were being developed to an important extent. Nevada, with its great Comstock lode, was attracting the attention of the civilized world. Much expensive litigation had arisen there,<sup>1</sup> and the necessity for some law giving a degree of certainty to mining titles was urgent. In addition to this, important quartz veins of great value had been discovered in other portions of Nevada, and in Colorado, Idaho, Montana, and other of the precious metal bearing states and territories. All these facts considered, it is safe to assume that the lode-mining industry was the one which was uppermost in the public mind, and which was most in need of national statutory regulation. At all events, until the passage of the placer law of 1870, no ultimate title to any mineral lands could be acquired, except to a "vein, or lode, of quartz or other rock in place, bearing "gold, silver, cinnabar, or copper."

The method of obtaining this title provided for in the act was simple; but the nature of the thing granted, the relationship of the surface and its boundaries to the lode, the extent of the dip or extralateral right, and some of the terms used in the act were, and still are, matters of serious contention and controversy.

The historical importance of the act of July 26, 1866, consists in the establishment of the three important principles enumerated in section fifty-four.

**§ 58. Relationship of surface to the lode.**—Under local rules, as well as under the act of 1866, the lode was the principal thing, and the surface was in reality an incident.<sup>2</sup>

<sup>1</sup>The surveyor-general for the state of Nevada, in his report for 1865, expressed the belief that one fifth of the output of the Comstock, estimated up to that date by Mr. J. Ross Browne at forty-five millions of dollars, was spent in litigation. (Mineral Resources of the West, 1867, p. 32.)

<sup>2</sup>Johnson v. Parks, 10 Cal. 447; Patterson v. Hitchcock, 3 Colo. 533, 544; Wolfley v. Lebanon, 4 Colo. 112; Walrath v. Champion M. Co., 63 Fed. 552.

While in some districts the precise quantity of surface allowed in connection with a lode was fixed by local rules, in many others no fixed quantity was mentioned. The lode only was located, the claims being staked, if at all, at the ends only. The notice of location usually called for so many feet on the vein, and a misdescription as to its course did not vitiate the location. The locator had a right prior to patent to follow it wherever it ran.<sup>1</sup>

Neither the form nor extent of the surface area claimed controlled the rights on the located lode. It did not measure the miner's right either to the linear feet upon its course or to follow the dips, angles, and variations of the vein.<sup>2</sup>

The local rules fixed no bounding planes across the course of the vein, and end lines were not in terms provided for, although they were, according to the decision in the Eureka case, implied. But there was no implication that they should be parallel.<sup>3</sup>

A locator could hold but one lode, or vein,<sup>4</sup> even if his claim had fixed surface boundaries. But the fact that two ledges existed within the bounds was required to be first established before the subsequent claimant had any lawful right to invade the surface boundaries of the senior locator.<sup>5</sup>

In all patents issued under the act, a recital was inserted, restricting the grant to the one vein, or lode, described therein, and providing that any other vein, or lode, discovered within the surface ground described should be excepted and excluded from the operation of the grant.

#### § 59. Construction of the act by the land department.

—Shortly after the passage of the act the commissioner of the general land office issued "circular instructions" for the guidance of the registers, receivers, and surveyors—

<sup>1</sup> Johnson v. Parks, 10 Cal. 447.

<sup>2</sup> Eureka Case, 4 Saw. 302, 323.

<sup>3</sup> Eureka Case, 4 Saw. 302, 319; Iron S. M. Co. v. Elgin, 118 U. S. 196, 208.

<sup>4</sup> Eureka Case, 4 Saw. 302, 323; Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304; Wairath v. Champion M. Co., 63 Fed. 552.

<sup>5</sup> Atkins v. Hendree, 1 Idaho, 107.



general in carrying the law into effect.<sup>1</sup> These instructions provided for the establishment of end lines at right angles to the ascertained or apparent general course of the vein, and permitted the applicant to apply for patent to a vein without any inclosing surface, the estimated quantity of superficial area in such cases being equal to a horizontal plane, bounded by the given end lines and the walls on the sides of the vein. As was said by the commissioner of the general land office, an applicant for a patent under this act might include surface ground lying on either or both sides of the vein as part of his claim, or he might apply for a patent for the vein alone. His rights upon the vein and in working it were precisely the same, whatever might be the form of his surface ground, or whether he had any or none.<sup>2</sup>

As to the effect of such patent, when issued, the department took the view that the patentee was fully invested with the title to his lode for the linear extent specified in the grant, whatever course the vein might be found to pursue underground;<sup>3</sup> and that he might follow the particular lode named in the patent to the number of feet expressed in the grant, although the ledge in its course should leave the surface ground described in the patent.<sup>4</sup> In other words, the department inclined to the opinion that the right of a lode claimant to pursue the vein to the extent of the number of linear feet claimed, whatever might be its course, was the same after patent as before.

Under this construction of the law, patents were issued in several instances describing a small area of surface, upon which the improvements were erected, within which surface a few hundred linear feet of the lode only was included, the remainder of feet claimed being indicated by a line extending beyond the defined surface area in the direction and to the extent claimed. An example of a patent issued

<sup>1</sup> Jan. 14, 1867 — Copp's Min. Dec., p. 239.

<sup>2</sup> Mt. Joy Lode — Copp's Min. Dec., p. 27.

<sup>3</sup> Flagstaff Case — Copp's Min. Dec., p. 61.

<sup>4</sup> Commissioner's Letter — Copp's Min. Dec., pp. 154, 201.

under this interpretation is found in the case of the famous Idaho mine in Grass Valley, California. We present for illustrative purposes a copy of the plat accompanying this patent:—

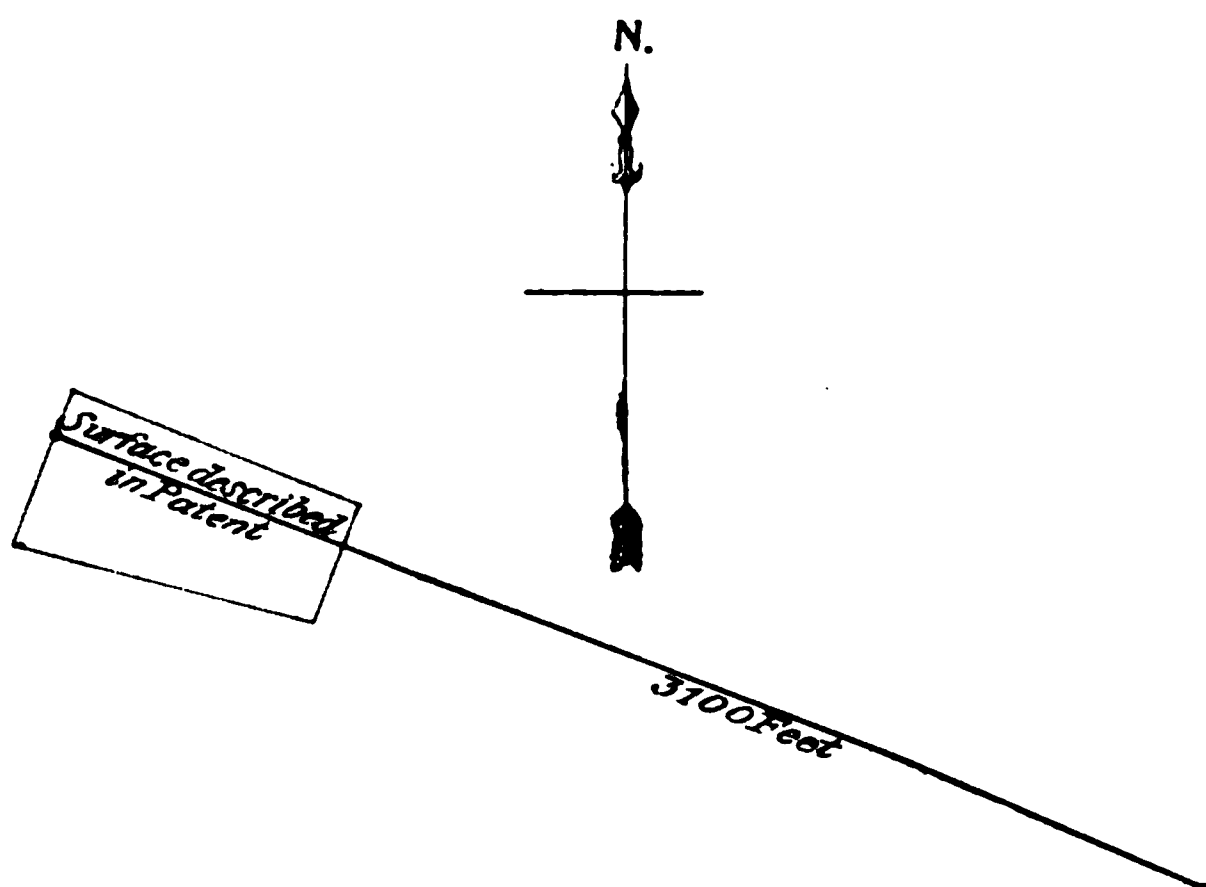


FIGURE 1.

This patent described the surface ground shown on the plat, and granted “the said mineral claim, or lot of land, “above described, with the right to follow said vein, or lode, “to the distance of thirty-one hundred linear feet, with its “dips, angles, and variations, although it may enter the land “adjoining.” Just what was in fact granted by the patent to a line might be the cause for serious controversy, even if the line correctly followed the outcrop of the vein. But subsequent development proved that this outcrop, or top, was considerably north of the patented line. Litigation arose between the Idaho and the Maryland, adjoining on the east, as to where the right of the Idaho on the vein terminated and that of the Maryland began, and as to what was the bounding plane on the dip between the two companies. Under the interpretation followed by the land department, it would seem that the Idaho company could follow the vein in whatever direction it ran, after leaving the surface boundaries, to the extent of the thirty-one

hundred feet. The trial court ruled that the diagram fixed the position of the lode, and that the bounding plane on the lode between the two companies was to be drawn through the point at the eastern terminus of the lode line shown on the plat. The case was compromised during the trial. It is cited simply to show some of the embarrassments flowing from the early interpretation by the land department of the act, and the difficulties encountered in later years where coterminous proprietors are brought into controversy with these old locations or with patents granted under this act.

Frequently the land department went to another extreme on this subject of surface ground. Patents were issued covering a few hundred feet of a lode, embraced within irregular surface boundaries which covered an area of several hundred acres.

Figure 2 presents an illustration of this. It is taken from a patent issued by the department, based upon a claim to the lode, originating under the act of 1866 upon proceedings completed and entry made prior to the passage of the act of May 10, 1872.

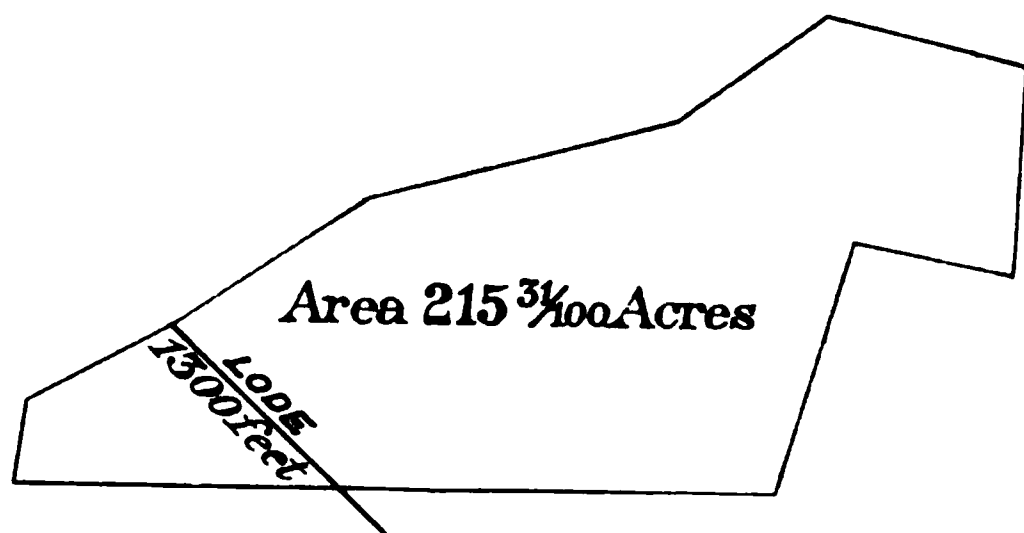


FIGURE 2.

So long as the act of 1866 was in force, which granted but the one lode, the legal controversies likely to arise over a proper construction of such a patent were not particularly serious. But when we consider that the act of 1872 purports to grant to the holder of such a patent all other lodes which have their tops, or apices, within the patented

surface area, it will be seen that many complications might arise as to end-line planes and dip rights between coterminous proprietors. All of this, however, will be reserved for future discussion. Our object has been simply to illustrate the rules of interpretation which prevailed in the land department.

§ 60. **Construction by the courts.**—The courts of last resort have uniformly overruled the interpretation of this act adopted by the land department, and have established the rule that surface lines, both side and end, were contemplated by the act of 1866, and that when a patent was once obtained the patentee was not permitted to follow the vein on its course beyond the surface boundaries.

The Flagstaff lode claim, in reference to which on application for patent the land department announced its interpretation<sup>1</sup> that the patentee might follow the lode to the linear extent claimed, whatever might be its course, came before the courts after the patent was issued, in two cases, one of which reached the supreme court of the United States. As the Flagstaff case is a noted one, and has served as a precedent in a number of controversies, we herewith present a diagram (figure 3)<sup>2</sup> illustrating the several controversies.

The Flagstaff patent granted a superficies one hundred feet wide by twenty-six hundred feet long, with the right to follow the vein to the extent of twenty-six hundred feet. It appeared that the lode crossed the side lines, as indicated on the diagram. Two controversies arose; one with the Nabob, on the west, and the other with the Titus, on the east. In each case the Flagstaff company contended that they had a right to the lode for the length thereof claimed, though it ran in a different direction from that in which it was supposed to run when the location was made.

<sup>1</sup> Copp's Min. Dec., p. 61.

<sup>2</sup> This diagram, so far as it relates to the case of Flagstaff M. Co. v. Tarbet, is taken from a certified copy of the map used at the trial. The Nabob claim is designated thereon from the description given in McCormick v. Varnes, 2 Utah, 355.

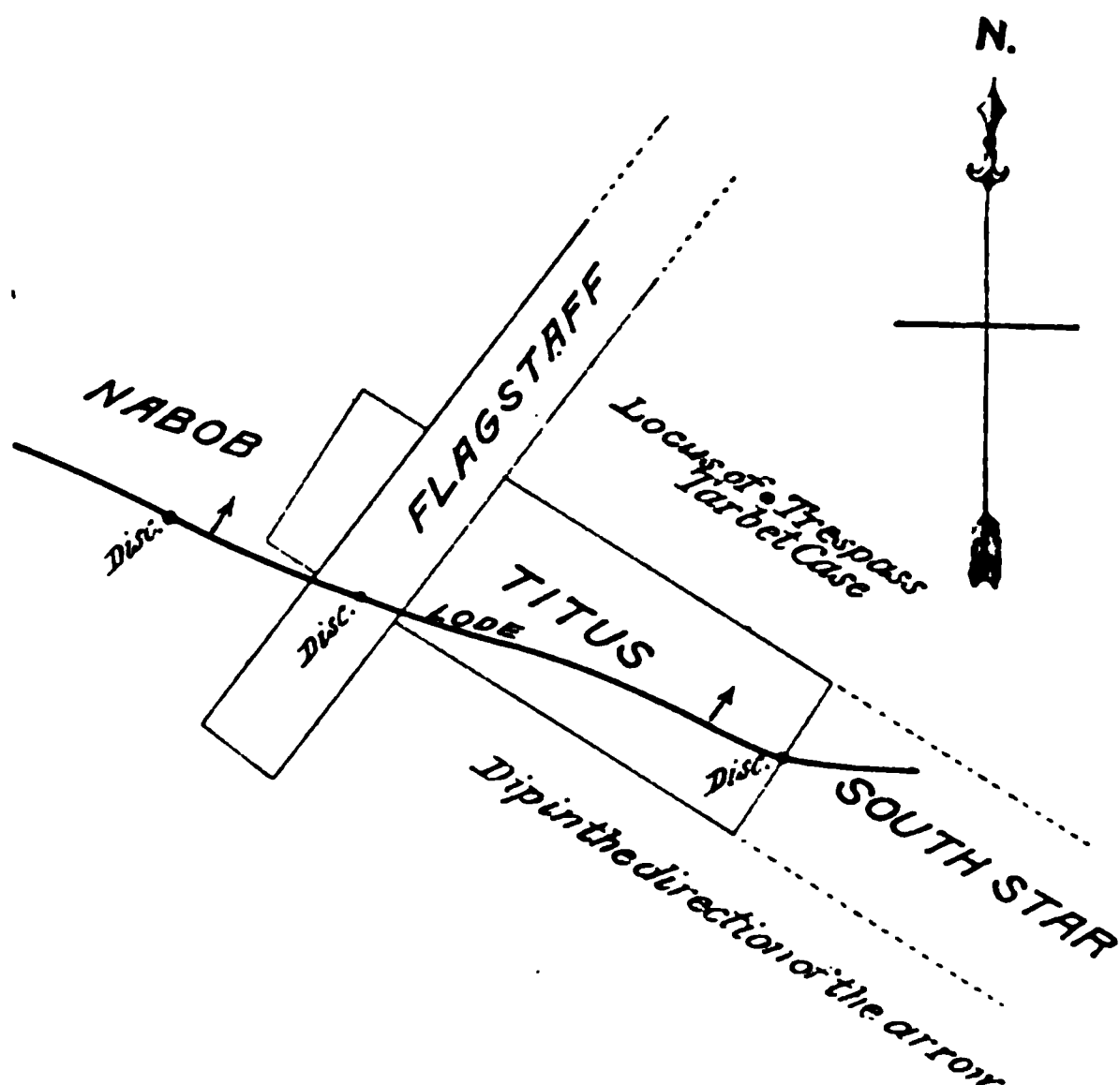


FIGURE 3.

The supreme court of Utah passed upon both cases, the Nabob case alone being reported, so far as that court was concerned.<sup>1</sup> It held in that case that the Flagstaff patented ground did not cover or embrace any part of the vein on its course, or strike outside of and beyond the side lines.

The Titus case was decided on parallel lines, and was appealed to the supreme court of the United States,<sup>2</sup> where the ruling was affirmed, and the doctrine firmly established that the right to the lode only extended to so much of the lode as is found within the surface boundaries. If the patentee located crosswise of the lode, and his claim was only one hundred feet wide, that one hundred feet is all he had a right to.

Prior to this decision of the supreme court of the United States, the supreme court of Colorado had announced the same doctrine as the supreme court of Utah,<sup>3</sup> but without

<sup>1</sup> McCormick v. Varnes, 2 Utah 355.

<sup>2</sup> Flagstaff M. Co. v. Tarbet, 95 U. S. 463.

<sup>3</sup> Wolfley v. Lebanon, 4 Colo. 112; Johnson v. Buell, 4 Colo. 557.

referring to the Utah cases. It is more than probable that the two courts reached the same conclusion without either having knowledge of the action of the other.

The doctrine of the Flagstaff case has recently been applied by Judge Hawley, sitting as circuit judge in the ninth circuit, to a case similar in principle.<sup>1</sup>

It will be thus seen that until a locator defined his claim for purposes of patent, under the act of 1866, he could follow the lode in any direction it might take to the length claimed; but after patent he was confined to the lines of his survey.

As to the extent of the dip or extralateral right under locations held and patents issued under the act of 1866, we reserve the discussion for a succeeding chapter. To a considerable extent this act and the titles issued under it are brought into connection, and are at least partly blended with the later, or present, legislative system and the titles held thereunder.

**§ 61. Local rules and customs after the passage of the act.**—It will be observed that the act left to local regulation all the details of location, limiting, however, the linear extent of an individual location to two hundred feet, with an additional claim to the discoverer, and providing that not more than three thousand feet should be taken in any one claim by any association of persons. The law also granted to the locators the right to follow the vein to any depth, with all its dips, angles, and variations. This was the rule in most mining districts before the passage of the act, although in certain localities lode claims were required to be "square," with no right to follow the vein on the dip beyond vertical planes drawn through the surface boundaries. As the act did not apply to placers, this class of claims continued to be entirely governed by local rules until the passage of the placer law of July 9, 1870. Lode claims continued to be so governed within the limitation

<sup>1</sup> *Walrath v. Champion M. Co.*, 63 Fed. 552; S. C. on appeal, 72 Fed. 978. 2

as to length of claim, and the extent which might be held by location on a given lode by any association.

§ 62. **The act of July 9, 1870.**—This is commonly known as the placer law, in contradistinction to the lode law of 1866, and was amendatory of and supplemental to that law. It provided, in terms, that claims usually called “placers,” including all forms of deposit, excepting veins of quartz or other rock in place, should be subject to entry and patent under like circumstances and conditions and upon similar proceedings as were provided for vein or lode claims, with the exception that a survey was not necessary where the proposed entry conformed to legal subdivisions. It fixed the price for such lands at two dollars and fifty cents per acre, and authorized their subdivision into ten-acre tracts. It limited the extent of a placer location, whether by an individual or an association of persons, to one hundred and sixty acres. Hitherto no limitation had been imposed as to the area which might be included in a location.<sup>1</sup> It also provided, that where a person or association of persons shall have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of possession and working of the claims for such period should be sufficient, in the absence of adverse claims, to entitle the applicant to a patent.<sup>2</sup> In other words, possession and working for the statutory period, without location, ripened into an equitable title against the government itself.

As we have heretofore observed, placer claims were first patentable under this act.<sup>3</sup>

The historical importance of the act (the full text of which will be found in the appendix) lies in the extension of the right to patent to placers and other forms of deposit, not included within the lode law of 1866.

<sup>1</sup> *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636.

<sup>2</sup> The land department construed this provision to apply to lode claims as well as placers. (Circ. Inst.—Copp's Min. Dec., p. 253.)

<sup>3</sup> *Deffeback v. Hawke*, 115 U. S. 392; *Moxon v. Wilkinson*, 2 Mont. 421.

§ 63. **Local rules and customs after the passage of the act.**—Under the placer law, placer locations were still to conform to local rules as to the extent of the claims, subject to the limitation that no more than one hundred and sixty acres could be located by an individual or an association of persons. In this respect individuals and associations seem to have been placed upon the same footing; that is, either might take up one hundred and sixty acres.<sup>1</sup>

With this limitation and the requirement that placer locations upon surveyed land should conform to the public surveys, the manner of locating, working, and conditions under which forfeiture arose were left to local regulation. The act remained in force less than two years, when it was superseded by the general mining act of May 10, 1872, which preserved its essential features.

§ 64. **Accession to the national domain during the third period.** The purchase of Alaska from Russia, in March, 1867, was the last of the treaties of purchase of territory, and added to and completed our present national and public domain.<sup>2</sup> It was not until 1884, however, that the laws relating to mining claims and rights incident thereto became operative in this district. The act providing for a civil government for Alaska<sup>3</sup> made such laws applicable, subject to regulations to be prescribed by the secretary of the interior,<sup>4</sup> and also provided that parties who had previously located mines or mineral privileges therein should not be disturbed, but should be allowed to perfect their claims. Prior to the passage of this act, patents for mining claims in Alaska could not be obtained.<sup>5</sup>

<sup>1</sup>St. Louis Smelting Co. v. Kemp, 21 Fed. Cases, 205.

<sup>2</sup>Public Domain, p. 138.

<sup>3</sup>May 17, 1884, — 23 Stats. at Large, p. 24.

<sup>4</sup>Land Decisions, p. 128.

<sup>5</sup>Commissioner's Letter — Copp's Min. Dec., p. 215.



## CHAPTER V.

### FOURTH PERIOD: FROM THE ENACTMENT OF THE LAW OF MAY 10, 1872, TO THE PRESENT TIME.

§ 68. The act of May 10, 1872.	§ 73. New provisions affecting both classes of claims.
§ 69. Declaration of governmental policy.	§ 74. Tunnels and mill sites.
§ 70. Changes made by the act— Division of the subject.	§ 75. Legislation subsequent to the act of 1872.
§ 71. Changes made with regard to lode claims.	§ 76. Local rules and customs since the passage of the act.
§ 72. Changes made with regard to other claims.	

§ 68. **The act of May 10, 1872.**—On May 10, 1872, congress passed a law entitled “An act to promote the development of the mining resources of the United States,” which, while re-affirming the policy of the government as to the exploration, development, and purchase of its mineral lands by its citizens, or those who had declared their intention to become such, yet, particularly with respect to lode claims, it made a radical departure. This act is practically embodied in the revised statutes of the United States, and, to all intents and purposes, constitutes the present system. It is printed in full in the appendix, where will also be found the various sections of the revision embodying its terms. It is not our purpose here to deal with it analytically. The entire treatise will practically be devoted to a discussion and exposition of it. It is our present purpose to simply outline its salient features, draw attention to the changes in the law made by the act, and give it its proper place in the history of mining legislation.

§ 69 **Declaration of governmental policy.** — With reference to the declaration of governmental policy, it embodies the spirit of the preceding enactments, making such changes in expression as was necessitated by substituting one enactment embracing all classes of mineral lands for two practically separate ones dealing with two distinct classes.

The act of 1866, declared that the mineral lands of the public domain should thenceforward be free and open to exploration and occupation by all citizens and those who had declared their intention to become such, and granted the privilege to the claimants of a vein, or lode, of obtaining title to the *mine*. The act of 1870 extended like privileges to the owners of placers and other forms of deposit.

The act of May 10, 1872, declares that all *mineral deposits* in land belonging to the United States are hereby open to exploration and purchase, and the *lands in which they are found* to occupation and purchase. The language in italics, particularly the last sentence, "the lands in which they are found," seems to foreshadow the intent of the act in its radical departure from the method theretofore in vogue of locating lode claims. As a declaration of policy, however, we can see no essential difference in the spirit of the old and that of the new. The latter was, to all intents and purposes, a reaffirmance of the former. Let us briefly examine and discuss the changes made by the act in other respects, bearing in mind that it is not our present intention to critically discuss the latter law in all its aspects. We simply wish to invite attention to the principal modifications of the old system, and enumerate the salient features of the new.

§ 70. **Changes made by the act** — **Division of the subject** — We can best deal with the subject by distributing it into three distinct heads —

- (1) Changes made with regard to lode claims;
- (2) Changes made with regard to other claims;

(3) New provisions affecting both classes of claims.

We will discuss these in the order enumerated.

§ 71. **Changes made with regard to lode claims.**—

The act of 1866 left the manner of locating these claims to local regulation, limiting the linear extent of each individual claim to two hundred feet, except in case of the discoverer, and to a maximum of three thousand feet to an association of persons.

We have seen that under the local rules locations were made of the *vein* and a given number of linear feet on its course was claimed; also, that prior to patent the locator could follow that vein, wheresoever it might run, to the extent claimed. His surface ground was for the convenient working of his lode, and its extent was regulated entirely by local custom. His right to the vein in length or depth was not dependent upon the form or extent of the surface ground. When he applied for and received a patent, he received title to but one lode, and could only follow that on its course to the extent which it was included within his surface lines. While end lines were implied, his right to pursue the vein in depth was not based upon their substantial parallelism.

The new law changed all this. As was said by Judge Beatty, "Disagreeable as the awakening may be, it is time we are opening our eyes to the fact that a new system has been introduced."<sup>1</sup>

Under the act of 1872, the miner locates a surface which must be so defined as to include the top, or apex, of his lode. Failing in this, he obtains nothing. If he mistakes the course of his vein, it is his loss. He can only hold the vein on its course to the extent that the top, or apex thereof, is found within his boundaries. He may thus acquire a superficies fifteen hundred feet in length by six hundred feet in width, if local regulations do not restrict these measurements.

In other words, under the old law he located the *lode*.

<sup>1</sup> Gleeson v. Martin White M. Co., 13 Nev. 442, 459.

Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex, of the vein. If he make such a location, containing the top, or apex, of his discovered lode, he will be entitled to all other lodes having their tops, or apices, within their surface boundaries. His end lines must be parallel and crosswise of the vein; otherwise, he cannot pursue his lode or lodes on their downward course beyond vertical planes drawn through his surface side lines.<sup>1</sup> The law, in terms, does not so state; but this is the interpretation reached by the courts.

The foregoing states the essential differences in theory between the two acts. By this act of 1872 there was also granted to the owners of "one-lode" patents, or locations, all lodes other than the one originally located, with the right to follow them in depth.

It may also be observed that the act of 1866 applied to claims upon lodes, or veins, of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper. With reference to claims located prior thereto, the act of 1872 added to the list of metallic substances named, lead, tin, and "other valuable deposits."

The act also contained rules for the determination of controversies between claimants of cross lodes and those uniting on the dip, and other minor details, all of which will be considered at the proper time.

**§ 72. Changes made with regard to other claims.—**No radical changes in the method of acquiring title to placers and other forms of deposit not in place were made by the act; but the quantity of ground which might be acquired by an individual was limited to twenty acres. The act is silent as to the quantity which might be taken by an association of persons. Judge Hallett was of the

<sup>1</sup> And, perhaps, these side lines produced, as in such case the side lines perform the functions of end lines.

opinion that the one-hundred-and-sixty-acre limitation in this respect, contained in the act of 1870, remained unrepealed.<sup>1</sup> Be that as it may, the revised statutes re-enacted this provision of the act of 1870.<sup>2</sup>

Provisions were also made for obtaining title to lodes known to exist within placers, and reserving such lodes from the operation of the placer patents, where they were not claimed by the placer applicant, a subject upon which the act of 1870 was silent.

**§ 73. New provisions affecting both classes of claims.**—The act of 1872 went beyond the preceding legislation in many details. It fixed the amount of annual work to be performed in order to maintain the integrity of locations made both before and after the passage of the act. It provided for the marking of the boundaries of claims, prescribed the contents of records, where local rules required record, and the conditions under which forfeiture might be worked. The proceedings to obtain patent, and the method of asserting and determining adverse claims, were much more elaborate than in the preceding act, as well as much more satisfactory.

**§ 74. Tunnels and mill sites.**—The act also provided a method of acquiring title to non-mineral land for the purpose of a mill site, either in connection with a located lode, or where used by the owner of a mill or reduction works. It also incorporated a provision with reference to tunnels as a means of discovering blind lodes, and securing certain rights on the discovered lodes to the locator and projector of the tunnel. These subjects will be fully discussed in their appropriate place.

**§ 75. Legislation subsequent to the act of 1872.**—Several amendments were made to the original act and some supplemental legislation of a minor character is to be noted

<sup>1</sup> St. Louis Smelting Co. v. Kemp, 21 Fed. Cases, 205.

<sup>2</sup> Rev. Stats., §. 2330.

before closing this historical review. A brief enumeration of these acts is all that will be here required

The act of February 18, 1873,<sup>1</sup> excepted Michigan, Wisconsin, and Minnesota from the operation of the general mining laws.

The acts of March 1, 1873,<sup>2</sup> and June 6, 1874,<sup>3</sup> extended the time for the performance of annual labor on claims located prior to the act of 1872; and the act of January 22, 1880,<sup>4</sup> fixed a uniform time for the performance of labor upon all claims located subsequent to the act of 1872.<sup>5</sup>

The act of March 3, 1873,<sup>6</sup> excepted Missouri and Kansas, and that of March 3, 1883,<sup>7</sup> exempted Alabama from the operation of the general mining acts. The act of January 12, 1877,<sup>8</sup> in relation to salines; the act of June 3, 1878,<sup>9</sup> in relation to timber cutting; and an act passed on the same day,<sup>10</sup> commonly known as "the stone and timber act," and the amendment to the latter act, passed August 4, 1892,<sup>11</sup> are the only other enactments during the period that are worthy of note.

Some of these acts have performed a temporary purpose; others, to some extent, form a part of the existing system, and, as such, will be again referred to in treating of the different subjects to which they relate.

With reference to the revised statutes, approved June 22, 1874, it may be said that, in the main, they were a mere revision and consolidation of the general laws existing and in force on December 1, 1873. The existing system of mining law, with the exception of a few acts passed since December 1, 1873, is found codified or consolidated into the

<sup>1</sup> 17 Stats. at Large, p. 465; C. M. L. 23.

<sup>2</sup> 17 Stats. at Large, p. 483; C. M. L. 23.

<sup>3</sup> 18 Stats. at Large, p. 61; C. M. L. 23.

<sup>4</sup> 21 Stats. at Large, p. 61; C. M. L. 24.

<sup>5</sup> *McGinnis v. Egbort*, 8 Colo. 41; *Slavonian M Co v. Vacavich*, 7 Saw. 217.

<sup>6</sup> 19 Stats. at Large, p. 52.

<sup>7</sup> 1 Land Decisions, p. 656.

<sup>8</sup> 19 Stats. at Large, p. 221.

<sup>9</sup> 20 Stats. at Large, p. 88.

<sup>10</sup> *Id.*, p. 89.

<sup>11</sup> Sup. R. S., vol. II, p. 65.

revised statutes. In treating of this system in the future we will simply refer to the sections of the revised statutes, unless the subject under discussion necessitates a reference to the original act.

§ 76. **Local rules and customs since the passage of the act.**—Subject to the limitations enumerated in the act the miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, and amount of work necessary to hold possession. While this privilege is thus granted, it is not universally exercised. Generally, in California the district organizations are things of the past; and we believe it is the case in other states and territories. The mining laws themselves are, under ordinary conditions, sufficient for all practical purposes. Yet we do encounter districts which still possess a potential existence. Therefore, local rules must be dealt with as a part of the existing system, though much limited in their scope.

They have performed their part in the scheme of evolution, and have, for the most part, disappeared, to be replaced by higher forms of legislation.

As to the state and territorial legislation, the tendency in later years has been in the direction of individual mining codes, more or less comprehensive. While the existing federal laws largely dispense with the necessity for local regulation and circumscribe the field within which states may legitimately act, yet we find individual codes in some instances re-enacting many of the provisions of the federal laws and supplementing them with numerous provisions, some of which are subject to the criticism of being in conflict with the paramount law. The force and effect of this class of legislation will receive due attention when the subjects to which they relate are under discussion.



## CHAPTER VI.

### THE FEDERAL SYSTEM.

§ 80. Conclusions deduced from preceding chapters.	§ 81. Outline of the federal system —Scope of the treatise.
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**§ 80. Conclusions deduced from preceding chapters.**  
—In the preceding chapters we have given a short synopsis of such foreign mining laws as might reasonably be supposed to have exerted an influence on our system. We have also traced the origin and gradual development of the body of substantive law which now governs the acquisition and enjoyment of mining rights upon the public domain of the United States, and have endeavored to show the relationship which the several states have occupied in the past, and now occupy, with reference to public mineral lands within their respective boundaries. From the general review, we are permitted to deduce the following general conclusions:—

Mines in the United States are not ranked as the property of society, the working of which is to be confided to the federal government. Mining with us is not a “public utility.” It is simply a private industry, to be fostered and encouraged, as all other economic industries are fostered and encouraged; but the exploitation and development of mines are no more governmental functions than is the cultivation of the soil or the business of manufacturing. The United States is the paramount proprietor of the public mineral lands, holding them not as an attribute of sovereignty, but as property acquired by cession and purchase. As such paramount proprietor, it has the same



right of dominion and power of alienation as is incident to absolute ownership in individuals.<sup>1</sup> By the term “public lands,” we mean such as are subject to sale or other disposal under general laws. Land to which any claims or rights of others have attached does not fall within the designation of “public land.”<sup>2</sup>

Whenever a tract of land has once been legally appropriated for any purpose, from that moment it becomes severed from the mass of public lands.<sup>3</sup>

While in the various treaties of cession and purchase through which territory was acquired and added to the national domain the federal government recognized and obligated itself to protect the rights and equities of grantees of the ceding nation or state, and by virtue of its federated system of government held certain property in trust for future states,<sup>4</sup> the great mass of the acquired territory falls within the designation of “public lands,” and passed to the United States untrammelled by either the tradition, laws, or policy of the ceding power, or by compact with the new states.<sup>5</sup>

As such absolute owner, the government might, at its pleasure, withhold its lands from occupation or purchase, lease them for limited periods,<sup>6</sup> donate them to states for educational or other purposes, and to individuals or corporations to aid in the construction of railways and other internal improvements, sell or otherwise dispose of them absolutely or conditionally, and prescribe the terms and conditions under which private individuals might acquire permanent ownership, or the right of temporary enjoyment.<sup>7</sup>

<sup>1</sup> *Lux v. Haggin*, 69 Cal. 255.

<sup>2</sup> *Newhall v. Sanger*, 92 U. S. 761; *Barden v. N. P. R. R.*, 145 U. S. 535, 538; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284.

<sup>3</sup> *Wilcox v. McConnel*, 13 Peters, 498.

<sup>4</sup> Tide lands—*Shively v. Bowlby*, 152 U. S. 1; Lands under navigable waters—*Pollard's Lessee v. Hagan*, 3 How. 212.

<sup>5</sup> *Pollard's Lessee v. Hagan*, 3 How. 212.

<sup>6</sup> *U. S. v. Gratiot*, 1 McLean, 454; *S. C.*, 14 Peters, 526.

<sup>7</sup> *Black v. Elkhorn M. Co.*, 163 U. S. 445.

The regalian doctrine of ownership in the crown of the royal metals, wheresoever found, based upon the theory that these metals were a prerogative of the crown, which prevailed in England, France, Spain, and Mexico, was never recognized in this country. A grant or conveyance by the United States carries all minerals, unless reserved expressly or by implication in the law or instrument purporting to pass the title.<sup>1</sup>

In countries from which the United States acquired its properties, the contrary doctrine prevailed, and minerals did not pass to the grantee unless specially named in the instrument.<sup>2</sup>

**§ 81. Outline of the federal system - Scope of the treatise.**—It follows as a corollary from what has been heretofore stated, that the system of rules which sanctions and regulates the acquisition and enjoyment of mining rights, and defines the conditions under which title may be obtained to mineral lands within the public domain of the United States, is composed of several elements, most of which find expression in positive legislative enactment. Others, while depending for their existence and force upon the sanction of the general government, either express or implied, are, in a measure, controlled by local environment, and are evidenced by the expressed will of local assemblages, embodied in written regulations, or rest in unwritten customs peculiar to the vicinage.

American mining law may therefore be said to be found expressed:—

- (1) In the legislation of congress;
- (2) In the legislation of the various states and territories supplementing congressional legislation and in harmony therewith;
- (3) In local rules and customs, or regulations established in different localities not in conflict with federal legislation or that of the state or territory wherein they are operative.

<sup>1</sup> *Fremont v. Flower*, 17 Cal. 199; *Barden v. N. P. R. R.* 154 U. S. 288; *Davis v. Webbald*, 139 U. S. 307.

<sup>2</sup> *Fremont v. Flower*, 17 Cal. 199; *United States v. Castillero*, 2 Black, 1; Halleck's Introduction to De Fooz on the Law of Mines, § 7.

This system does not seek to regulate or control mines or mining within lands held in private ownership, except such only as are acquired directly from the government under the mining laws, and then only forming a muniment of the locator's or purchaser's title. It does not require the payment of tribute or royalty as a condition upon which the public mineral lands may be explored or worked. As heretofore observed, it treats the government simply as a proprietor holding the paramount title to its public domain, with right of disposal upon such terms and conditions, and subject to such limitations, as the law-making power may prescribe. With the exception, perhaps, of lands containing deposits of coal and some of the baser substances, the system is practically confined in its operation to those states and territories lying wholly or in part west of the hundredth meridian, embracing the states of California, Colorado, Oregon, Washington, Nevada, Idaho, Montana, North Dakota, South Dakota, Wyoming, Utah, the territories of Arizona, New Mexico, and the district of Alaska.<sup>1</sup> These comprise the precious-metal-bearing states and territories of the public domain. This system, as thus defined and limited, is the subject of this treatise.

This system is by no means symmetrical or perfect. It is one of the most difficult branches of the law to even logically arrange for the purpose of treatment, and the embarrassments surrounding its philosophical exposition are almost insurmountable. It has received attention in a fragmentary way at the hands of eminent writers, who are most logical and instructive when discoursing upon its imperfections and apparent absurdities. The courts are not harmonious with regard to rules of interpretation. No one tribunal has exclusive jurisdiction to determine questions arising under it. Its proper interpretation does not always involve federal questions, conferring upon the federal courts jurisdiction. It has thus come to pass that the

<sup>1</sup> By act of congress all lands in Oklahoma are declared to be agricultural.

courts of last resort in several of the states and territories, in construing the same law, have reached diametrically opposite conclusions; and in many of its most important features we have conflicting theories enumerated by different courts of equal dignity and equal ability, until we are almost constrained to say that "chaos has come again."

It is not our purpose to condemn the system, but to endeavor to deal with it fairly as we find it. In the language of Judge Beatty,—

"Nobody can pretend that it is perfect; but to our minds  
"it is a great improvement on the system which it displaced. We are willing to admit that cases may arise  
"to which it will be difficult to apply the law; but this  
"only proves that such cases escaped the foresight of congress, or that, although they foresaw the possibility of  
"such cases occurring, they considered that possibility so  
"remote as not to afford a reason for departing from the  
"simplicity of the plan they chose to adopt. So far the  
"wisdom of the congressional plan has been sufficiently  
"vindicated by experience."<sup>1</sup>

<sup>1</sup>Gleeson v. Martin White M. Co., 13 Nev. 442.



## TITLE III.

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### LANDS SUBJECT TO APPROPRIATION UNDER THE MINING LAWS, AND THE PERSONS WHO MAY ACQUIRE RIGHTS THEREIN.

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#### CHAPTER

- I. "MINERAL LANDS" AND KINDRED TERMS DEFINED.;
- II. THE PUBLIC SURVEYS; AND THE RETURN OF THE  
SURVEYOR-GENERAL.;
- III. STATUS OF LAND AS TO TITLE AND POSSESSION.
- IV. OF THE PERSONS WHO MAY ACQUIRE RIGHTS IN  
PUBLIC MINERAL LANDS.



## CHAPTER I.

### 7 "MINERAL LANDS" AND KINDRED TERMS DEFINED.

§ 85. Necessity for definition of terms.	§ 92. Substances classified as mineral under the English decisions.
§ 86. Terms of reservation employed in various acts.	§ 93. American cases defining "mine" and "mineral."
§ 87. "Mine" and "mineral" indefinite terms.	§ 94. "Mineral lands" as defined by the American tribunals.
§ 88. English denotation—"Mine" and "mineral" in their primary sense.	§ 95. Interpretation of terms by the land department.
§ 89. Enlarged meaning of "mine."	§ 96. American rules of statutory interpretation.
§ 90. "Mineral" as defined by the English and Scotch authorities.	§ 97. Substances held to be mineral by the land department.
§ 91. English rules of interpretation.	§ 98. Rules for determining mineral character of land.

§ 85. **Necessity for definition of terms.**—It becomes necessary for us to determine precisely what character of lands fall within the purview of the mining laws, and to define, at least with reasonable certainty, what may be the subject of appropriation under them. To say that these laws apply to mineral lands only, and that mineral lands alone can be occupied and enjoyed under them, states the fact broadly. But what are *mineral lands*? What is the test of the character of a given tract, when its mineral quality is asserted by a claimant under the mining laws, and that assertion is denied by an agricultural claimant to the same tract? To enable us to intelligently answer these questions, we are called upon to consider the phrases employed in the various acts of congress, and sift them down to a generic or comprehensive term, from which we



may proceed to evolve a definition as accurate as the nature of the subject will permit. To accomplish this we may have to briefly retrace our steps.

§ 86. **Terms of reservation employed in various acts.**—As we have already observed,<sup>1</sup> in the earlier legislation of congress, establishing a system for the pre-emption and settlement of the public domain, as well as in most of the legislative grants to the states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, mineral lands were uniformly reserved from the operation of the law, and were excepted from the grant. The terms employed in specifying what was reserved are not altogether uniform. A few examples will illustrate this.

The pre-emption act of 1841 (section ten) provided that no lands on which are situated any *known* salines or mines should be liable to entry under and by virtue of the provisions of the act.

The act of September 27, 1850, creating the office of surveyor-general of Oregon, and providing for surveys, and making donations to settlers, directs "that no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act."

The act of March 3, 1853, for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes, directs that none other than township lines shall be surveyed where the lands are mineral or are deemed unfit for cultivation, excluding in express terms "mineral lands" from the operation of the pre-emption act of 1841, and further interdicting any person from obtaining the benefit of the act by a settlement or location on "mineral lands."<sup>2</sup>

By the fourth section of the act of July 22, 1854, to establish the offices of surveyors-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers

<sup>1</sup> See, *ante*, § 47.

<sup>2</sup> Public Domain, p. 311.

therein, and for other purposes, it is directed that none of the provisions of the act shall extend to "mineral lands," salines, etc.

The act of July 4, 1866, giving authority for varying surveys from the rectangular system in Nevada, reserves from sale in all cases "lands valuable for mines of gold, "silver, quicksilver, or copper."

The acts of July 1, 1862,<sup>1</sup> and July 2, 1864,<sup>2</sup> commonly known as the "Pacific railroad acts," reserve "mineral lands," excepting coal and iron from the designation.

Illustrations might be multiplied indefinitely, but the foregoing are sufficient for our present purpose.

No legislative interpretation or definition of the term "mineral lands," which were so reserved and excepted, was ever attempted. This was left for judicial or departmental construction.

As during the early periods of our legislative history the ownership of these reserved lands remained in the government, and were withheld from private ownership, conflicts of asserted title rarely, if ever, arose, and opportunity for judicial interpretation was not afforded.

When a change in the policy of the government took place, and that which had theretofore been uniformly reserved became subject to sale and appropriation as "mineral land," "lands valuable for mines," "lands containing valuable mineral deposits," "lands claimed for valuable deposits," and other designations, *ejusdem generis*, the necessity arose for a rule of interpretation sufficiently comprehensive to embrace the terms when used either as words of exception in a grant or act of congress, or as defining the subject of a grant under the mining laws.

While the land department, in passing upon the character of land sought to be entered as mineral under these laws, in the absence of protest or controversy as to its character, might be satisfied with a much less degree of proof than would be required to bring the same tract within the

<sup>1</sup> 12 Stats. at Large, p. 489.

<sup>2</sup> 13 Stats. at Large, p. 356.

excepting clause of a prior grant, logically the term “mineral lands,” and its equivalent terms, wherever used in the acts or grants of congress, either as words of reservation or in the mining laws authorizing their appropriation, has the same limit and breadth of signification. What had been reserved by one series of legislative enactments, and in the different legislative grants, is identically that the appropriation of which is encouraged and sanctioned by another series of laws.

The term “known mines,” as used in the pre-emption act of 1841, is not the precise equivalent of the term “mineral lands,” as used in the mining laws, and should undoubtedly receive a more limited interpretation. The discussion of this particular term may therefore remain in abeyance until we enter upon the subject of pre-emption claims in conflict with asserted mining rights.

Eliminating, therefore, from present consideration “known mines,” as the words are used in the act above referred to, we are called upon to consider the following terms and phrases:—

(1) “Mineral lands,” as used in statutes reserving them from sale, or other disposal, and in section one of the act of July 26, 1866;

(2) “All forms of deposit,” in section twelve of the act of July 9, 1870, and section twenty-three hundred and twenty-nine of the Revised Statutes;

(3) “Lands containing valuable mineral deposits,” in section one of the act of 1872, and section twenty-three hundred and nineteen, Revised Statutes;

(4) “Land claimed for valuable deposits,” in section six, act of 1872, and section twenty-three hundred and twenty-five, Revised Statutes;

(5) “Lands valuable for minerals,” in section twenty-three hundred and eighteen, Revised Statutes;

(6) “Lands valuable for mines,” as used in the act of July 4, 1866, giving authority for varying surveys in Nevada.

While the supreme court of the United States<sup>1</sup> seems to intimate that the expression "lands containing valuable "mineral deposits," used for the first time in the act of 1872, and re-enacted in the Revised Statutes, is of broader import than the term "mineral lands" used in the previous acts, a careful study and analysis of all cases decided by that court, as well as all courts in the mining regions, fail to disclose any material distinction in the meaning of the two terms. "Mineral lands" are lands that contain "valuable "mineral deposits," and *vice versa*. The same may be said of the other terms.

From a well-considered examination of all the authorities on this subject, there is no room for any conclusion other than that the expressions "mineral lands," "all forms "of deposits," "lands containing valuable mineral deposits," "valuable deposits," "lands valuable for minerals," "lands "valuable for mines," are, generally speaking, legal equivalents, and may be, and frequently are, used interchangeably.

In this view our preliminary inquiry may be addressed to a consideration of the terms "mines" and "minerals."

§ 87. "Mine" and "mineral" indefinite terms.—Mr. Ross Stewart, in the opening chapter of his recent valuable work on mines, quarries, and minerals in Scotland,<sup>2</sup> says:—

"The terms 'mine' and 'mineral' are not definite terms: they are susceptible of limitation according to the intention with which they are used; and in construing them regard must be had not only to the deed or statute in which they occur, but also to the relative position of the parties interested and the substance of the transaction or arrangement which the deed or statute embodies. Consequently, in themselves, these terms are incapable of a definition which would be universally applicable."<sup>3</sup>

§ 88. English denotation—"Mine" and "mineral" in their primary sense.—An examination of the English authorities shows what may be appropriately termed an evolution of denotation, beginning in the earlier history of

<sup>1</sup> Deffeback v. Hawke, 115 U. S. 392.

<sup>2</sup> Stewart on Mines, p. 1.

<sup>3</sup> Edinburgh, 1894.

English jurisprudence with the primary or etymological significance of the words, and gradually enlarging their meanings until their original derivation and early judicial application became all but obsolete. In this primary sense, a “mine” denoted an underground excavation made for the purpose of getting minerals;<sup>1</sup> and, as a corollary, minerals primarily were the substances obtained through underground excavations.

The word “mine” was used in contradistinction to “quarry,” and “minerals” meant substances of a mineral character which could only be worked by means of *mines* as distinguished from *quarries*.<sup>2</sup> In other words, regard was there had entirely to the *mode* in which the substance was obtained, and not to its chemical or geological character.<sup>3</sup>

William’s law dictionary<sup>4</sup> defines “minerals” to be “anything that grows in mines and contains metals,” and “mines” is defined as “quarries or places whereout any thing is dug; this term is likewise applied to hidden treasure dug out of the earth.” These same definitions recur in Tomlin’s law dictionary.<sup>5</sup>

Lord Halsbury says: “I should think that there could be no doubt that the word ‘minerals’ in old times meant the substances got by mining; and I think ‘mining’ in old times meant subterranean excavation.”<sup>6</sup>

§ 89. **Enlarged meaning of “mine.”**—These primary significations were soon enlarged, so that in time the word “mine” was construed to mean, also, the place where minerals were found, and soon came to be used as an equivalent of “vein,” “seam,” “lode,” or to denote an aggregation of veins, and, under certain circumstances, to include quarries and minerals obtained by open workings.<sup>7</sup>

<sup>1</sup> *Midland Ry. Co. v. Haunchwood B. & T. Co.* (1882), L. R. 20 Ch. D. 552.

<sup>2</sup> *Darvill v. Roper*, 3 Drewry, 294.

<sup>3</sup> Bainbridge on Mines, 4th ed., p. 5.

<sup>4</sup> London, 1816.

<sup>5</sup> London, 1835.

<sup>6</sup> *Magistrates of Glasgow v. Farie*, L. R. 13 App. C. 657.

<sup>7</sup> *Midland Ry. Co. v. Haunchwood B. & T. Co.* (1882), L. R. 20 Ch. D. 558; Stewart on Mines, p. 2.

§ 90. "**Mineral**" as defined by the English and Scotch authorities. In reference to the term "mineral," we quote the following from Bainbridge —

"A mineral has been defined, in the narrow sense of the word, to be a fossil or what is dug out of the earth, and which is predominantly metalliferous in character. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountains as the deepest hidden diamonds and metallic ores."<sup>1</sup>

Mr Stewart says. —

"Both scientifically and popularly the term 'mineral' has been applied to substances whose chemical and physical properties are sufficiently uniform to admit of identification and classification, whether they exist in a mine or upon the surface of the ground."<sup>2</sup>

A few illustrations from comparatively recent authorities will enable us to understand the modern signification given to the term "mineral" by the English courts.

In *Midland Railway v. Checkley*,<sup>3</sup> Lord Romilly, master of the rolls, said

"Stone is, in my opinion, a mineral, and, in fact, everything except the mere surface which is used for agricultural purposes. Anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire-clay, or the like, comes within the word 'mineral,' when there is a reservation of the mines and minerals from a grant of land."

In *Midland Railway Co. v. Haunchwood B. & T. Co.*,<sup>4</sup> Mr. Justice Kay expressed the view that "minerals" meant, primarily, all substances (other than the agricultural surface of the ground) "which may be got for manufacturing

<sup>1</sup> Bainbridge on Mines, 4th ed. p. 1. See, also, Stewart on Mines, p. 9.

<sup>2</sup> Stewart on Mines, p. 9.

<sup>3</sup> 1882, L. R. 20 Ch. D. 552.

<sup>4</sup> 1897, L. R. 4 Eq. C. 19.

“or mercantile purposes, whether from a mine, as the word  
“would seem to signify, or such as stone or clay, which are  
“gotten by open working.”

In the leading case of *Hext v. Gill*,<sup>1</sup> the house of lords announced the rule that a reservation of “minerals” includes every substance which can be obtained from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning.<sup>2</sup>

In *Attorney-General v. Welsh Granite Co.*,<sup>3</sup> Lord Esher, master of the rolls, said:—

“The many cases which have been cited go to establish  
“the definition, especially *Attorney-General v. Mylchreest*,<sup>4</sup>  
“and *Hext v. Gill*, where Mellish, L. J., states the result of  
“authorities. It is evident from these cases that ‘min-  
“erals’ means substances which can be got from beneath  
“the surface, not by mining only, but also by quarrying,  
“for the purpose of profit.”

In *Magistrates of Glasgow v. Farie*, before the house of lords, involving the interpretation of a reservation in an act of parliament authorizing the construction of waterworks,<sup>5</sup> wherein it was provided that the undertakers of the project “shall not be entitled to any mines of coal, iron-  
“stone, slate, or other minerals under any land purchased  
“by them,” Lord Herschell thus announced his view:—

“I think the reservation must be taken to extend to all  
“bodies of mineral substances lying together in seams,  
“beds, or strata, as are commonly worked for profit.”<sup>6</sup>

In *Loosemore v. Tiverton & North Devon Ry. Co.*,<sup>7</sup> Mr. Justice Fry, following *Hext v. Gill*, says:—

<sup>1</sup> (1872), L. R. 7 Ch. App. 699.

<sup>2</sup> This doctrine was approved and followed in a later case (*Attorney-General v. Tomline* (1877), L. R. 5 Ch. D. 750.)

<sup>3</sup> (1887), 35 W. R. 617.

<sup>4</sup> (1879), 4 App. C. 294.

<sup>5</sup> Waterworks Clauses Act, (1847), 10 & 11 Vict. C. 17.

<sup>6</sup> L. R. 13 App. C., 685.

<sup>7</sup> (1882), L. R. 22 Ch. D. 25.



"There being no such restrictive context in the present case, the inquiry is whether the clay which was got out was clay which could be worked for a profit."

Lord Halsbury, in the *Farie* case (*supra*), criticises the doctrine of *Hext v. Gill*. He says:—

"In the first place, it introduces as one element the circumstances that the substance can be got at a profit. It is obvious that if that is an essential part of the definition, the question whether a particular substance is or is not a mineral may depend on the state of the market; and it may be that a mineral one year is not a mineral the next."

Lord Herschell, in the same case, thus expresses his views:—

"In its widest significance the word 'mineral' probably means every organic substance forming a part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the reported cases it seems to be laid down or assumed that to be a mineral a thing must be of commercial value or workable at a profit. Be that as it may, it has been laid down that the word 'minerals' when used in a legal document, or in any act of parliament, must be understood in its widest signification, unless there be something in the context, or in the nature of the case, to control its meaning."<sup>1</sup>

Of course, the element of profitable working is in no sense a part of the definition of the word in its primary or etymological sense.

While these criticisms of Lord Herschell are plausible when the primary or etymological signification of the word is considered, yet the doctrine of *Hext v. Gill* and the later cases following it may be fairly said to present a reasonable definition in the light of the progressiveness of the age and advancement in the natural sciences, with which the courts seem to have kept pace.

This element of commercial value, which to a large extent controls the acquisition of mining titles in the United States, is by no means new. The German codes contained

<sup>1</sup> *Magistrates of Glasgow v. Farie*, (1888), L. R. 13 App. C. 689-690.



a limitation prohibiting the prospector from claiming mineral or ore which did not offer the basis for practical and *lucrative* mining or metallurgical operations. Under the French and Belgian systems, before a mining concession could be obtained, it was necessary "to ascertain whether the land contains a layer which is susceptible of a profitable working."<sup>1</sup>

In Sweet's dictionary of English law,<sup>2</sup> we find the following definition:—

"In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit."<sup>3</sup>

§ 91. **English rules of interpretation.**—Mr. Stewart enunciates certain rules as being sanctioned by current authority in England and Scotland, governing the construction of the term "mineral." These are as follows:—

"*First*—The word 'mineral,' when used in a legal document or in an act of parliament, must be understood in its widest signification, unless there be something in the context or nature of the case to control its meaning.

"*Second*—The meaning of the word 'mineral,' though not easily restricted, yields to the context when the relative positions of the parties interested, their intention, or the substance of the transaction so indicates.

"*Third*—In doubtful cases, the custom of the district, or such usages without which a deed or statute would be inconsistent may limit the word 'minerals.'

"*Fourth*—Where the terms 'mines' and 'minerals' are both used in the same deed or statute, the word 'minerals' is not on that account to suffer limitation of its meaning."<sup>4</sup>

In treating of the rules governing the interpretation of American statutory law, we will have occasion to recur to the foregoing.

<sup>1</sup> Halleck's De Fooz on the Laws of Mines, p. 110.

<sup>2</sup> London, 1882.

<sup>3</sup> This definition was also adopted in Rapalje and Lawrence's law dictionary, published in America the following year.

<sup>4</sup> Stewart on Mines, pp. 10-13.

**92. Substances classified as "mineral" under the English decisions.**—Before leaving the subject of the English law and decisions, it is not out of place to enumerate some of the substances which have been adjudicated to be within the term "mineral."

It is hardly necessary to mention gold, silver, the common metals, or coal, as they fall within the earlier definition of the term, and were usually obtained through underground excavations. In addition to these, the following substances have been successively held to be minerals:—

*Beds of stone*, obtained either by mining or quarrying;<sup>1</sup>

*Stone*, obtained by quarrying;<sup>2</sup>

*Stone*, for road-making and paving;<sup>3</sup>

*Freestone* (sandstone);<sup>4</sup>

*Limestone*;<sup>5</sup>

<sup>1</sup> *Earl of Rosse v. Wainman* (1845), 14 M. & W. 859; S. C., 10 Morr. Min. Rep. 398—construing act of parliament (55 Geo. III., c. 18—inclosure act.) reserving to the lord "all mines and minerals."

<sup>2</sup> *Mickletwait v. Winter*, 6 Exch. 644.

<sup>3</sup> *Midland Railway v. Checkley* (1867), L. R. 4 Eq. C. 19.

Reservation in canal act (1709) of the mines and minerals within and under the lands through which the canal was to be made. In this case the master of the rolls said that every species of stone, whether marble, limestone, or ironstone, came within the category of "minerals."

In *Bed v. Wilson* (*post*), the vice-chancellor said that in strictness the term "mineral" comprises chalk, slate, and all kinds of stone, whether freestone, sandstone, or granite.

In *Adjutant General v. Welsh Granite Co.* (1887), 35 W. R. 617—construing inclosure act (1812), similar to that considered in *Rosse v. Wainman* (*supra*), it was held that the term "mineral" included granite.

<sup>4</sup> *Bell v. Wilson* (1865), 2 Drew. & S. 395—S. C. on appeal, L. R. 1 Ch. App. 303.

Exception in a lease of "mines and seams of coal and other mines, metals, or minerals, as well opened as not opened."

*Jameson v. North British Ry. Co.*, 6 Scot. L. Rep. 188—construing Scotch railway clauses act, which is identical with English act. See, *post*, note 4, p. 100.

*Glasgow & S. W. Ry. Co. v. Bain* (1893), 21 R. 134; *Mawson v. Fletcher* (1870), L. R. 6 Ch. App. C. 91, 94.

<sup>5</sup> *Fishbourne v. Hamilton* (1890), L. R. 25 Ir. 483; *Md. Ry. v. Robinson* (1889), L. R. 15 App. C. 19; *Brown's Trust*, 11 W. R. 19; *Glasgow & S. W. Ry. Co. v. Bain* (1893), 21 R. 134; *Mawson v. Fletcher* (1870), L. R. 6 Ch. App. C. 91; *Dixon v. Caledonian & Glasgow Ry. Co.*, L. R. 5 App. C. 820.

*Flint stones*, turned up with the plow by the tenant in the course of husbandry; <sup>1</sup>

*Slate*; <sup>2</sup>

*Clay*; <sup>3</sup>

*Brick clay*; <sup>4</sup>

*China clay* (kaolin — sometimes called porcelain, or fire-clay); <sup>5</sup>

<sup>1</sup> *Tucker v. Linger* (1883), L. R. 8 App. C. 508.

Reservation in lease of “mines and minerals, quarries of stone, brick-earth, and gravel pits.” But tenant held to be entitled to them by virtue of local custom.

<sup>2</sup> *Duchess of Cleveland v. Meyrick*, 16 W. R. 104; 37 L. J. Ch. 125.

<sup>3</sup> *Ruabon Brick and Terra Cotta Co. v. Great Western Ry. Co.* (1893), L. R. 1 Ch. 427. Within the meaning of the “railway clauses act.”

*Errington v. Met. Ry. Co.* (1882), L. R. 19 Ch. D. 559, 571. Within the meaning of the “railway clauses act.”

*Attorney-General v. Mylchreest* (1879), 4 App. C. 294.

Lord Herschell, in *Magistrates of Glasgow v. Farie* (1888), L. R. 13 App. C. 683.

<sup>4</sup> *Midland Ry. Co. v. Haunchwood B. & T. Co.* (1882), L. R. 20 Ch. D. 552.

In this case a controversy arose under acts of parliament known as the “railway clauses acts.” These acts, among other things, prescribe the methods by which railway companies may obtain, by what is termed “compulsory purchase,” land for their road-beds, stations, and other necessary adjuncts. Similar acts are in force in both England and Scotland, and appear to be a substitute for the condemnation proceedings used in this country. The following extracts from one of these acts will serve to show the context under consideration in this case, as well as in a number of others which may be referred to:—

“And, with respect to mines lying under or near the railway, be it enacted,—

“SEC. 77. The company shall not be entitled to any mines of coal, “ironstone, slate, or other minerals under any land purchased by them, “except only such parts thereof as shall be dug or carried away, or used “in the construction of the works, unless the same shall have been “expressly purchased; and all such mines shall be deemed excepted out “of the conveyance of such lands, unless they shall have been expressly “named therein and conveyed thereby.”

Subsequent sections provide that the owner of the minerals desiring to work within forty yards of the railway or under the same must give the company notice. Thereupon the company may exercise the option of purchasing the minerals, the value thereof to be ascertained by appraisement. If the company does not give notice within thirty days of the exercise of that option, the owner of the minerals may work under the railway.

<sup>5</sup> Exception in grant of freehold in copyhold tenement, by Duke of Cornwall (1799), reserving “all mines and minerals within and under the

*Coprolites* (phosphatic nodules) <sup>1</sup>

The foregoing illustrations will serve to demonstrate the evolution of denotation referred to in a preceding paragraph, and give a fair outline of the meaning given to the terms "mines" and "minerals" by the courts of last resort in England and Scotland. Considering the scope of this treatise, a more critical review of the English authorities would serve no useful purpose.

§ 93. **The American cases defining "mine" and "mineral."** - In America, until a comparatively recent period, controversies over the construction of the terms "mines" and "minerals" have been limited to cases arising, as in many of the English cases, out of the use of these terms in conveyances, leases, and the like, where the context, or the peculiar situation of the parties, or the subject of the litigation, to some extent at least, controlled. A brief review of some of these authorities will be of interest.

In *Gibson v. Tyson*,<sup>2</sup> the supreme court of Pennsylvania had under consideration a grant reserving to the grantee "all minerals or magnesia of any kind." This was held to include chromate of iron; but the court intimated that had it not been for the parol evidence concerning the supposed character of the land, and the situation of the parties at the time the instrument was executed, it would have excluded the substance afterwards found and designated as chromate of iron, because it was non-metallic, and the "great mass of mankind do not consider anything mineral" "that is not metallic."

"premises, with full and free liberty of ingress, egress, and regress, to dig, search for, and to take, use, and work, for the said excepted mines and minerals." *Hext v. Gil* 1872, L. R. 7 Ch. App. 699.

Working for china clay in this case was by stripping the soil from the bed and turning a stream of water over the clay, similar to the "streaming" practiced in some portions of Cornwall, and to the hydraulic process in vogue in this country.

*Loosemore v. Tiverton & N. Devon Ry. Co.* (1882), L. R. 32 Ch. D. 25 — construing section 77, "railway clauses act" of 1845. See, *ante*, note 4, p. 100.

<sup>1</sup> Attorney Gen. v. Tomlins (1877), L. R. 5 Ch. Div. 750.    <sup>2</sup> 5 Watts, 35.

In *Hartwell v. Camman*,<sup>1</sup> the New Jersey court of chancery, in construing the terms of a conveyance granting “all mines, minerals, opened or to be opened,” thus states its views:—

“By the use of the terms ‘mines’ and ‘minerals,’ it is clear that the grantor did not intend to include every-thing embraced in the mineral kingdom, as distinguished from what belongs to the animal and vegetable kingdom. If he did, he parted with the soil itself. . . . Nor can I see any more propriety in confining the meaning of the terms used to any one of the subordinate divisions into which the mineral kingdom has been subdivided by chemists, either earthy, metallic, saline, or bituminous. . . . I do not think the term should be confined to the metals, or metallic ores. I cannot doubt if a stratum of salt, or even a bed of coal, had been found, they would have passed under the grant.”

The court holds that “paint-stone” falls within the term “minerals,” as the substance was valuable for its mineral properties, could be converted into a merchantable article adapted to the mechanical and ornamental arts, and was embraced in the definition given by men of science.

In *Funk v. Haldeman*,<sup>2</sup> the supreme court of Pennsylvania treated petroleum oil as a mineral, saying that “until our scientific knowledge on the subject is increased, that is the light in which the courts will be likely to regard this valuable production of the earth.”

Under a statute of Pennsylvania, passed April 25, 1850, it was provided that suit in the county where the lands were situated might be brought by a tenant in common of “minerals.” Under this act the court of common pleas of Erie county<sup>3</sup> held that petroleum was a mineral, and the fact that it was unknown as a product from land at the time the act was passed did not prevent its application.

In *Griffin v. Fellows*,<sup>4</sup> a question arose as to the construction of an instrument, executed in 1796, leasing a

<sup>1</sup> 10 N. J. Eq. 128; 3 Morr. Min. Rep. 229; 64 Am. Dec. 448.

<sup>2</sup> (1866), 53 Pa. St. 229.

<sup>3</sup> *Thompson v. Noble* (1870), 3 Pittsb. 201.

<sup>4</sup> (1873), 32 P. F. Smith, 114; 8 Morr. Min. Rep. 657.

tract of public land, "together with the mines or minerals of whatever description." There were no opened mines or quarries on the premises at the date of the lease. Mining of coal was first commenced by the tenant in 1810, and quarrying stone in 1835. It was held by the supreme court of Pennsylvania, adopting the views of the trial court, that "the term 'minerals' embraces everything not "of the mere surface, which is used for agricultural purposes; the granite of the mountains, as well as metallic "ores and fossils, are comprehended within it,"<sup>1</sup> and consequently that, "by the terms of the lease, the lessee and "his assigns have the right to mine coal and quarry "stone."

In *Dunham v. Kirkpatrick*,<sup>2</sup> in construing a deed conveying a reservation of "all minerals," the supreme court of Pennsylvania held that while it was true that petroleum was a mineral, yet in popular estimation it was not so regarded; and following the rule of construction invoked in *Gibson v. Tyson*, the court concluded, that in contemplation of the parties to the instrument petroleum did not pass by the deed.

The same court, however, in a more recent case,<sup>3</sup> seems to have ignored the doctrine of *Dunham v. Kirkpatrick*.

The legislature of Pennsylvania had passed an act providing, among other things, for the mortgaging of a "leasehold of any colliery, *mining land*, manufacturing, or "other premises." In passing upon the act, the court held that petroleum was a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may, with propriety, be called mining lands. Therefore, the act applied to and authorized a mortgage of a leasehold of oil land, although the act was passed *before petroleum was discovered*, substantially following the doctrine announced in *Thompson v. Noble* (*supra*).

<sup>1</sup> Citing the English case of *Earl of Rosse v. Wainman*, heretofore referred to.

<sup>2</sup> (1882), 101 Pa. St. 4, 47 Am. Rep. 696.

<sup>3</sup> *Gill v. Weston* (1885), 110 Pa. St. 316.

The same court, in a still later case,<sup>1</sup> holds that natural gas is a mineral, although it possesses peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration, and terms it a mineral *feræ naturæ*.

A recent case, decided by the New York court of appeals,<sup>2</sup> involved the construction of two deeds executed by the owner of a tract of land. The first deed conveyed all the "mineral ores" in the tract, "reserving all other rights and interests in said lands, save said mineral ores and the right to raise and remove the same." By the second deed, which made no reference to the first, there was conveyed to the same grantees all the mineral *and* ores on the same tract, with the right to mine and remove the same; also, the right to sink shafts, and sufficient surface to erect suitable buildings necessary and usual in mining and raising ores; also, the right of ingress and egress for mining purposes, and to make exploration for minerals and ores.

The plaintiff was the owner of whatever passed by these two conveyances. The defendant was the owner of what remained of the tract. The controversy arose over the right of the defendant to quarry granite on the tract. The granite was discovered on the premises after the first two deeds were executed, but prior to the acquisition of title by defendant. The court, after reviewing several of the English cases hereinbefore cited and the New Jersey case of *Hartwell v. Camman* (*supra*), reached the conclusion that the term "mineral ores" used in the first deed did not include granite; that the words "minerals and ores" used in the second deed, standing alone, would include granite; that it would be an unwarrantable limitation to exclude from the operation of the grant beds of coal or other non-metallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time. But the court held that the

<sup>1</sup> *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 130 Pa. 235.

<sup>2</sup> *Armstrong v. Lake Champlain Granite Co.*, 42 N. E. Rep. 186.



context of the second deed conveying the "mineral and ores" limited the grant to such minerals as could be obtained by underground workings, and as granite is not so obtained, it did not pass under the conveyance.

The court also held that the meaning of the words "minerals and ores" in a deed could not be limited or explained by declaration of the parties thereto as to what was intended to be covered by the deed, reformation thereof not being sought.

The foregoing line of authorities serves to illustrate the views of the various courts of the United States in dealing with the terms "mines" and "minerals" in cases having no connection with the various acts of congress which we are called upon to construe. In interpreting these acts it cannot be demonstrated that either the English or American cases have been an appreciable factor, or have been either cited or relied upon as precedents; yet it is manifest that they have exerted some influence, and that we shall observe their earmarks as we progress.

§ 94. "Mineral lands," as defined by the American tribunals.—In a preceding section<sup>1</sup> it has been assumed that the term "mineral lands" is sufficiently comprehensive to embrace the various kindred designations found in the various acts of congress, and that these various terms may be, and frequently are, used interchangeably. Upon this assumption, let us consider what is meant by the term "mineral lands" and its legal equivalents.

On this subject there has been great uniformity of decision by those courts of the states and of the United States which have had the most frequent occasion to consider the subject, and by the land department.<sup>2</sup>

The supreme court of California as early as 1864 gave its views upon the question in a well considered case,<sup>3</sup> the earmarks of which may be plainly observed in many, if

<sup>1</sup> See, *ante*, § 86.

<sup>2</sup> *Ali Yew v. Choate*, 24 Cal. 562.

<sup>3</sup> *Davis v. Webb*, 139 U. S. 507.



"or mercantile purposes, whether from a mine, as the word "would seem to signify, or such as stone or clay, which are "gotten by open working."

In the leading case of *Hext v. Gill*,<sup>1</sup> the house of lords announced the rule that a reservation of "minerals" includes every substance which can be obtained from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning.<sup>2</sup>

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"The many cases which have been cited go to establish "the definition, especially *Attorney-General v. Mylchreest*,<sup>4</sup> "and *Hext v. Gill*, where Mellish, L. J., states the result of "authorities. It is evident from these cases that 'min- "erals' means substances which can be got from beneath "the surface, not by mining only, but also by quarrying, "for the purpose of profit."

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In *Loosemore v. Tiverton & North Devon Ry. Co.*,<sup>7</sup> Mr. Justice Fry, following *Hext v. Gill*, says:—

<sup>1</sup> (1872), L. R. 7 Ch. App. 699.

<sup>2</sup> This doctrine was approved and followed in a later case (*Attorney-General v. Tomline* (1877), L. R. 5 Ch. D. 750.)

<sup>3</sup> (1887), 35 W. R. 617.

<sup>4</sup> (1879), 4 App. C. 294.

<sup>5</sup> Waterworks Clauses Act, (1847), 10 & 11 Vict. C. 17.

<sup>6</sup> L. R. 13 App. C., 685.

<sup>7</sup> (1882), L. R. 22 Ch. D. 25.

"There being no such restrictive context in the present case, the inquiry is whether the clay which was got out was clay which could be worked for a profit"

Lord Halsbury, in the *Farie* case (*supra*), criticises the doctrine of *Hext v. Gill*. He says:—

"In the first place, it introduces as one element the circumstances that the substance can be got at a profit. It is obvious that if that is an essential part of the definition, the question whether a particular substance is or is not a mineral may depend on the state of the market; and it may be that a mineral one year is not a mineral the next."

Lord Herschell, in the same case, thus expresses his views:—

"In its widest significance the word 'mineral' probably means every organic substance forming a part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the reported cases it seems to be laid down or assumed that to be a mineral a thing must be of commercial value or workable at a profit. Be that as it may, it has been laid down that the word 'minerals' when used in a legal document, or in any act of parliament, must be understood in its widest signification, unless there be something in the context, or in the nature of the case, to control its meaning."<sup>1</sup>

Of course, the element of profitable working is in no sense a part of the definition of the word in its primary or etymological sense.

While these criticisms of Lord Herschell are plausible when the primary or etymological signification of the word is considered, yet the doctrine of *Hext v. Gill* and the later cases following it may be fairly said to present a reasonable definition in the light of the progressiveness of the age and advancement in the natural sciences, with which the courts seem to have kept pace.

This element of commercial value, which to a large extent controls the acquisition of mining titles in the United States, is by no means new. The German codes contained

<sup>1</sup> *Magistrates of Glasgow v. Farie*, (1888), L. R. 13 App. C. 689-690.

“ more for agriculture than mining, it is not mineral land,  
 “ although it may contain some measure of gold or silver,  
 “ and the bill in this case is drawn on that theory of the  
 “ law. In my judgment, that is the only practical rule  
 “ of decision that can be applied to the subject. Nor can  
 “ account be taken in the application of this rule of profits  
 “ that would or might result from mining under other and  
 “ more favorable conditions and circumstances than those  
 “ which actually exist, or may be produced or expected in  
 “ the ordinary course of such pursuit or adventure on the  
 “ land in question.”

In *Dughi v. Harkins*,<sup>1</sup> which was before the interior department in November, 1883, there was a contest between mineral and agricultural claimants, the land having been returned as agricultural by the surveyor-general. In disposing of it, Secretary Teller, in a communication to the commissioner of the general land office, said:—

“ The burden of proof is therefore upon the mineral  
 “ claimant, and he must show, not that neighboring or  
 “ adjoining lands are mineral in character, or that that in  
 “ dispute may hereafter, by possibility, develop minerals  
 “ in such quantity as will establish its mineral rather than  
 “ its agricultural character, but that as a present fact it is  
 “ mineral in character; and this must appear from actual  
 “ production of mineral, and not from any theory that it  
 “ may produce it; in other words, it is fact, and not theory,  
 “ which must control your office in deciding upon the char-  
 “ acter of this class of land. Nor is it sufficient that the  
 “ mineral claimant shows that the land is of little agricul-  
 “ tural value. He must show affirmatively, in order to  
 “ establish his claim, that the mineral value of the land is  
 “ greater than its agricultural value.”<sup>2</sup>

Rulings to the same effect upon applications for mineral patents are found in decisions of the department for many years. They are that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. If mineral patents will not be issued unless the mineral exist in sufficient quantity to

<sup>1</sup> 2 Land Decisions, p. 721.

<sup>2</sup> Quoted in *Davis v. Webbald*, 139 U. S. 507.

render the land more valuable for mining than for other purposes, which can only be known by developments or exploration, it should follow that the land may be patented for other purposes, if that fact does not appear.<sup>1</sup>

The leading case of *Davis v. Webb* (*supra*), reviews these rulings, and so clearly affirms their doctrine that nothing more is required than to freely quote this case. Says the court:

"It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, where issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication on this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in *Deffeback v. Hawke*, 115 U. S. 392; and in the cases of *Colorado C. & I. Co.*, 123 U. S. 307; *United States v. Iron S. M. Co.*, 128 U. S. 673."

§ 95. Interpretation of terms by the land department.—As in all contests between agricultural and mineral claimants prior to final entry, in all applications to enter lands under the mining laws, and in administering the various grants to railroads, as to lands remaining unpatented, the land department is the sole judge of the character of the land and the final arbiter upon this subject, it is deemed important to supplement the foregoing selection of authorities by presenting the rulings of that department on the subject. They enter somewhat more

<sup>1</sup> *Magaha G. M. Co. v. Ferguson*, 6 L. D. 218; *Nicholas Abercrombie*, *Id.* 393; *John Downs*, 7 L. D. 41; *Cutting v. Remingtons*, *Id.* 236; *Creswell M. Co. v. Johnson*, 8 L. D. 440; *Thomas J. Loney*, 9 L. D. 83.

into detail, and will furnish a reliable guide to those who may have occasion to deal with that special tribunal upon the subject of mineral lands.

Commissioner Drummond<sup>1</sup> thus enunciates the rule which has since governed the land department:—

“In the sense in which the term ‘mineral’ was used by congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. . . . From a careful examination of the matter, the conclusion I reach as to what constitutes a valuable mineral deposit is this: That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office as coming within the purview of the mining act of May 10, 1872.”

“The only safe rule for the department to follow is that already laid down and adhered to in many cases—that the coal or mineral character of the land must be determined by the actual production from mining on the tract in dispute, or by satisfactory evidence that mineral (coal) exists on the land in question in sufficient quantities to make the same more valuable for mining than for agriculture. . . .

“It has been repeatedly held by this department that the proof of the mineral character of the land must be specific, and show actual production of mineral therefrom; that it is not enough to show that land in the neighborhood, or adjoining lands, are mineral in character, or that the lands in question may hereafter be found to be mineral. (Kings County *v.* Alexander, 5 L. D. 126; and Dughi *v.* Harkins, 2 L. D. 721.) The proof must show satisfactorily the mineral (coal) character, and not be based upon a theory.”<sup>3</sup>

“It is contended that the mining statutes provide that in an *ex parte* case, ‘land containing gold in any quantity’ is mineral land, and that they contemplate inquiry into the value of the deposit only when the application of the mineral locator conflicts with that of some other locator or claimant.’ . . .

<sup>1</sup> Circ. of Instructions, July 15, 1873.

<sup>2</sup> Copp’s Min. Dec., p. 317; W. H. Hooper, 1 L. D. 561.

<sup>3</sup> Savage *v.* Boynton, 12 L. D. 612.

"It must be apparent that, for the purpose of issuing patent, there is lodged somewhere the authority and duty to ascertain whether a claim contains 'valuable deposits,' for no other land can be so acquired. It is equally clear that for the same purpose such authority is vested in this department, charged, as it is, with the determination of the facts prior to the issuance of patent. Should the question of the character of the land be properly presented at any time before patent, it would manifestly be the duty of the department to ascertain whether or not the land contains 'valuable deposits,' in an *ex parte* case or a contest. The fact that a claim is contested would not change the character of the land to be taken under this law. In any event, it must contain 'valuable deposits.'"<sup>1</sup>

"The proof of the mineral character of the land must be specific, and based upon the actual production of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the lands in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must appear from actual production of mineral, and not from a theory that the lands may hereafter produce it."<sup>2</sup>

The present existence of mineral in such quantity as to render the land more valuable for mining than agriculture must be shown, to defeat an agricultural entry.<sup>3</sup>

"It is not necessary that, to meet the requirements, there should be upon the land a mine in working order, from which gold is being actually produced. It is sufficient if it be shown by satisfactory proof that mineral exists in paying quantities, and such proof will usually be based on mining operations or explorations. In the present case it has not been shown that any mining has been carried on on this land. The evidence consists of the testimony of persons, most of them claiming to be expert miners, who went upon this land and panned out small quantities of earth. The preponderance thereof shows that the land bears gold, and taking the testimony of the witnesses for the mineral claimants alone, it sustains the conclusion that it is there in paying quantities."<sup>4</sup>

<sup>1</sup> Royal K. Placer, 13 L. D. 86.

<sup>2</sup> Warren v. State of Colorado, 14 L. D. 681.

<sup>3</sup> Winters v. Bass, 14 L. D. 59; Wulton v. Batten, *Id.* 54; Penano v. Pendola, 10 L. D. 516.

<sup>4</sup> Johns v. Marsh (1892), 15 L. D. 196.



"When the development, and its results, display such promise that the prudent, reasonable man would be justified in expending money and labor in legitimate mining operations, untainted by an appearance of speculation, the land must be held mineral within the meaning of that term as used in the granting act. (Pacific railroad acts.) If it was held otherwise, the mining industry, so far as it pertained to odd sections within the grant, would be paralyzed. The rule is that paying mines are only shown to exist after years of labor and much money expended in the development. Prospectors do not find riches on the surface. Profit is not received from the grass-roots down. They must have an opportunity given them to open the mine as their means permit."<sup>1</sup>

"After a careful consideration of the subject, it is my opinion that where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.' For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be willing to risk time and capital in the attempt to bring to light and make available the mineral wealth which lies concealed in the bowels of the earth, as congress obviously must have intended the explorers should have proper opportunity to do."<sup>2</sup>

In determining what constitutes mineral land within the meaning of the acts of congress, we have treated the subject generally, without regard to the form in which the mineral deposits occur—*i. e.* whether "in place," as in quartz veins, or not "in place," as in case of auriferous gravels, clays, and other substances usually encountered in horizontal beds or isolated deposits. What constitutes a vein, or lode, or whether a given character of deposit may

<sup>1</sup> Casey v. N. P. R. R., 15 L. D. 439.

<sup>2</sup> Castle v. Womble, 19 L. D. 455; Goldstein v. Juneau Townsite, 23 L. D. 353.

be located and acquired as "in place," or not "in place," will be discussed under appropriate heads in other portions of this work. The rulings cited and definitions quoted apply equally to all forms of deposit.

§ 96. **American rules of statutory interpretation.** In addition to the ordinary canons of statutory interpretation, there are certain recognized rules applicable to the acts of congress which are within the scope of this treatise. These may be briefly enumerated as follows. —

(1) The mining laws are to be read in the light of matters of public history, relating to the mineral lands of the United States;<sup>1</sup>

(2) Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the government rather than that of the individual;<sup>2</sup>

(3) In the case of a doubtful or ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and ought not to be overruled without cogent reasons.<sup>3</sup>

We might add a fourth rule, deducible from the foregoing, and from the current of American authority and decisions of the land department, and that is, that the word "mineral," as used in these various acts, should be understood in its widest signification. We do not conceive that there is anything in the context of the several acts, or in their nature, to restrict its meaning. This is practically the English rule announced by Mr. Ross Stewart, which has heretofore been referred to, and which is amply supported by the highest English authority.<sup>4</sup>

<sup>1</sup> *Jennison Exr. v. Kirk*, 98 U. S. 453.

<sup>2</sup> *Stadell v. Grandjean*, 111 U. S. 412; *Leavenworth L. & C. R. Co. v. United States*, 92 U. S. 733; *Barden v. N. P. R. R.*, 154 U. S. 228.

<sup>3</sup> *United States v. Moore*, 95 U. S. 700; *Brown v. United States*, 113 U. S. 568; *Barden v. N. P. R. R.*, 154 U. S. 228.

<sup>4</sup> See, *ante*, § 91.



We regret that this last suggested rule is in conflict with the decision of the supreme court of the state of Washington (in the case of *Wheeler v. Smith*),<sup>1</sup> wherein that court seeks to limit the meaning of the term "mineral," as used in the congressional mining laws, to *metallic* substances. In so doing the court treats the rulings of the land department as possessing no force or virtue, and refuses to adopt the reasoning and conclusions reached in a parallel case by the supreme court of Montana,<sup>2</sup> a court noted for its experience and ability in dealing specially with mining questions and controversies arising out of the mining laws. This decision of the supreme court of Washington also conflicts with a number of carefully considered American cases, which will be noted when we come to enumerate the various substances which have been held to be within the reasonable definition of the term "mineral."

§ 97. **Substances held to be mineral by the land department.**—Lands containing the following substances have been held by the land department to fall within the designation of mineral lands, and as such to be subject to entry under the mining laws:—

<i>Asphaltum</i> ; <sup>3</sup>	<i>Nitrate and carbonate of soda,</i>
<i>Petroleum and the mineral</i>	<i>sulphur, and alum</i> ; <sup>6</sup>
<i>hydrocarbons</i> ; <sup>4</sup>	<i>Kaolin, or china clay</i> ; <sup>7</sup>
<i>Borax</i> ; <sup>5</sup>	<i>Mica</i> ; <sup>8</sup>

<sup>1</sup> 32 Pac. 784.

<sup>2</sup> *Freezer v. Sweeney*, 21 Pac. 20; 8 Mont. 508.

<sup>3</sup> Copp's Min. Lands, 50. See, also, *Gesner v. Gas Co.*, 1 James, N. S. 72; *Gesner v. Cairus*, 2 Allen, N. B. 595.

<sup>4</sup> Copp's Min. Lands, 160; Com'rs' Letter, 1 Copp's L. O. 179; A. A. Dewey, 9 Copp's L. O. 51. See, also, *Thompson v. Noble*, 3 Pittsb. 201; *Gill v. Weston*, 110 Pa. St. 313; *Gird v. California Oil Co.*, 60 Fed. 531. *Contra: Ex parte Union Oil Co.*, 23 L. D. 222; *Chandler v. State of California*, *Id.*, October 27, 1896.

<sup>5</sup> Copp's Min. Lands, 50, 100; 2 Land Decisions, 707.

<sup>6</sup> Copp's Min. Lands, 50; 2 Land Decisions, 707.

<sup>7</sup> Copp's Min. Lands, 121; *Id.* 176; 1 Land Decisions, 578.

<sup>8</sup> Copp's Min. Lands, 182.

<i>Umber;</i> <sup>1</sup>	<i>Phosphates;</i> <sup>7</sup>
<i>Gypsum;</i> <sup>2</sup>	<i>Building stone, and stone of special</i>
<i>Limestone;</i> <sup>3</sup>	<i>commercial value;</i> <sup>8</sup>
<i>Marble;</i> <sup>4</sup>	<i>Coal;</i> <sup>9</sup>
<i>Diamonds;</i> <sup>5</sup>	<i>Slate for roofing purposes.</i> <sup>10</sup>
<i>Clay;</i> <sup>6</sup>	

Salt lands are classified as mineral, and held to be reserved from railroad grants:<sup>11</sup> and originally the department permitted them to be acquired under the mining laws,<sup>12</sup> but this was subsequently overruled.<sup>13</sup>

Other than the decisions and rulings of the land department, we encounter a limited number of cases involving specific substances. This is easily accounted for. The

<sup>1</sup> Copp's Min. Lands, 181.

<sup>2</sup> *Id.* 309.

<sup>3</sup> 10 Copp's L. O. 50; 12 Land Decisions, 1; *Shepherd v. Bird*, 17 L. D. 82; Copp's Min. Lands, 176; *Id.* 309. See, also, *Freezer v. Sweeney*, 21 Pac. 20; 8 Mont. 508. *Contra: Wheeler v. Smith*, 32 Pac. 784.

<sup>4</sup> Copp's Min. Lands, 176.

<sup>5</sup> *Id.* 82.

<sup>6</sup> *Montague v. Dobbs*, 9 Copp's L. O. 165.

<sup>7</sup> *Gary v. Todd*, 18 L. D. 52. But see S. C. on review — 19 L. D. 475. And held not to be mineral within the meaning of reservation in railroad grants: *Tucker v. Florida Ry. & N. Co.*, 19 L. D. 414.

<sup>8</sup> *Conlin v. Kelly*, 12 L. D. 1, overruling *In re Bennet*, 3 L. D. 116; *McClenn v. Weinbroer*, 15 L. D. 370; *Vandoren v. Piested*, 16 L. D. 508; *Delaney*, 17 L. D. 120.

But held not to be excepted as mineral from grant to a state: *South Dakota v. Vermont S. Co.*, 16 L. D. 293.

The passage of the act of 1892 (Sup. to Rev. Stats., vol. II, p. 65) removes all future controversy on the subject, and permits lands containing these substances to be entered as mineral lands.

<sup>9</sup> *McKean v. Buell*, Copp's Min. Lands, 343; *Townsite of Coalville*, 4 Copp's L. O. 46; *In re Norager*, 10 Copp's L. O. 24.

Coal, however, is disposed of under special laws, and will be separately considered in another portion of this treatise.

<sup>10</sup> Copp's Min. Lands, 143.

<sup>11</sup> *Eagle Salt Works*, Copp's Min. Lands, 336.

<sup>12</sup> Copp's Min. Lands, 333.

<sup>13</sup> 7 Land Decisions, 549.

Salines are not subject to disposal under the mining laws. The policy of the government with reference to this character of lands and the laws regulating their disposal will be separately considered in another portion of this treatise.

land department is the tribunal specially charged with the determination of the character of lands falling within the purview of the laws considered in this treatise. This question being one of fact, the determination by the department culminating in the issuance of a patent is conclusive, and not open to collateral attack. Such controversies therefore rarely find their way into the courts. In a succeeding chapter, treating of placers and other deposits, will be found cited the few cases which we have been able to discover upon the subject.

**§ 98. Rules for determining mineral character of land.**  
—While it is difficult to formulate a definition sufficiently comprehensive in itself to cover all possible exigencies, we think that a conservative application of the rules governing statutory construction, heretofore enumerated in connection with the adjudicated cases and rulings of the land department, permits us to deduce the following:—

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce; or—

(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

## CHAPTER II.

### THE PUBLIC SURVEYS AND THE RETURN OF THE SURVEYOR GENERAL.

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|--|--|
| § 102. No general classification of lands as to their character. | § 105. What constitutes the surveyor-general's return.                 |
| § 103. Geological surveys.                                       | § 106. <i>Prima facie</i> character of land established by the return. |
| § 104. General system of land surveys.                           | § 107. Character of land, when and how established.                    |

§ 102. **No general classification of lands as to their character.** No general systematic classification of the public lands, according to their mineral or non-mineral character, for the purpose of sale or other disposal, has ever been attempted.

Geological examination and survey of lands in the Lake Superior district, and in the Chippewa land district, in Wisconsin, were provided for by acts of congress, passed in 1847.<sup>1</sup>

These acts conferred authority on the president to sell at public auction such land as contained copper, lead, or other valuable ores, at the minimum price of five dollars per acre. And such examination and survey were for the purpose of establishing the character of the lands in these regions, for the express purpose of sale as mineral lands.

But three years later (September 26, 1850), this policy was abandoned, and this class of lands in these districts was directed to be sold in the same manner, at the minimum price, and with the same rights of pre-emption as other public lands.<sup>2</sup>

<sup>1</sup> March 1, 1847, 9 Stats. at Large, 146; March 3, 1847, *Id.* 179.

<sup>2</sup> Public Domain, 308-309.

§ 103. **Geological surveys.**—Since then extensive geological surveys have been and are now being made in various parts of the United States; but although these surveys are conducted under the supervision of the department of the interior, and are of great economic as well as scientific value, the results obtained perform no function in the public land system, are not noted in the tract-books in the different land offices, and are not necessarily considered in determining the mineral or non-mineral character of the land embraced within the limits of the geological survey.

§ 104. **General system of land surveys.**—It is a matter of common knowledge that the public lands are ordinarily surveyed into rectangular tracts, bounded by lines conforming to the cardinal points. These surveys are made under the immediate supervision of the United States surveyors-general in their respective surveying districts. The actual surveys in the field are conducted by deputies appointed by the surveyors-general, to whom all reports are primarily made.

In prosecuting work in the field, the deputies are charged with the duty of noting at the end of their notes of survey coal banks or beds, peat or turf grounds, minerals, and ores, with particular description of the same as to quality and extent, and all “diggings” therefor; also, salt springs and licks, together with a general description of the township in the aggregate, as respects the face of the country, its soil and geological features, timber, minerals, water, and the like.<sup>1</sup>

§ 105. **What constitutes the surveyor-general's return.**—The original field-notes and accompanying data, with a topographical sketch of the country surveyed, are returned to the surveyor-general, who examines them, and, if found correct, approves them, whereupon the draughtsman protracts the same on township plats in triplicate.

<sup>1</sup> Instructions to surveyors-general, Public Domain, 575 *et seq.*

After approving the plats, the surveyor-general files the original in his office, the duplicate is sent to the local land office, to enable the register and receiver to dispose of the lands embraced in the several townships, and the triplicate is transmitted to the commissioner of the general land office. These approved field-notes, taken in connection with the township plats protracted in the office, constitute what is known as the surveyor-general's return.

§ 106. **Prima facie character of land established by the return.**—The lands embraced in the survey are treated *prima facie* as being of the character shown by this return, and are said thenceforward to be borne on the official records as agricultural, timber, or mineral land, according to the facts developed by the return. If lands are noted on the plat as mineral, they are *prima facie* mineral lands, and no entry thereof will be permitted, except under the mining laws, until the presumption arising from the return is overcome by satisfactory proofs.<sup>1</sup>

A return by the surveyor that sixteenth and thirty-sixth sections granted to the states for school purposes are mineral, and the approval of his field-notes and plats, and the filing thereof in the general land office, are a sufficient determination that the lands are mineral to authorize a selection of indemnity school lands by the state.<sup>2</sup>

If the lands are not returned as mineral, the presumption obtains that they are agricultural in character, and therefore cannot be entered under the mining laws until the return is contradicted. At all inquiries held for the purpose of investigating the character of surveyed lands, this return has been said to rank as a deposition.<sup>3</sup>

It is unnecessary to say that this return is open to

<sup>1</sup> Gold Hill Q. M. Co. v. Ish, 5 Ore. 104; Cowell v. Lammers, 10 Saw. 248; Johnston v. Morris, 72 Fed. 890; Dobbs' Placer, 1 L. D. 567; Dughi v. Harkness, 2 L. D. 721; Cole v. Markley, *Id.* 847; Hooper v. Ferguson, *Id.* 712; Roberts v. Jepson, 4 L. D. 60.

<sup>2</sup> Johnston v. Morris, 72 Fed. 890; *In re* State of California, 23 L. D. 423.

<sup>3</sup> Kirby v. Lewis, 39 Fed. 66; United States v. Breward, 16 Peters, 147; United States v. Hanson, *Id.* 106.

contradiction.<sup>1</sup> It concludes no one.<sup>2</sup> When a legal mineral location (which, of course, must be based upon a discovery) has been made, the slight presumption in favor of the return is overcome, and the burden of proof shifts to the party attacking the mineral claim.<sup>3</sup> But evidence of an actual discovery is necessary. A mere location certificate will not be sufficient.<sup>4</sup> The allowance of a mineral entry of a tract, as a matter of course, overcomes a return as agricultural.<sup>5</sup>

While the rule which treats the surveyor-general's return as establishing *prima facie* the character of the land is a convenient one in controversies arising between individuals over an asserted right to enter public lands, as determining upon whom rests the burden of proof, it has been productive of iniquitous results in administering the colossal land grants to railroad companies; and we are justified in asserting that its force as a universal rule has been materially weakened, if not absolutely destroyed, by the recent decisions of both the land department and the courts of last resort.

When it is considered that sections of one mile square are the smallest tracts the outboundaries of which the law requires to be actually surveyed; that the minor subdivisions are not surveyed in the field, but are defined by law, and protracted in the surveyor-general's office on the township plats, the lines being imaginary;<sup>6</sup> that surveyors, as a rule, are neither practical miners nor geologists; that they are compensated not for the volume of information furnished as to the character of the lands, but for the number of linear miles surveyed in the field; that their investigation as to the character of the land is wholly superficial,—

<sup>1</sup> *Caledonia M. Co. v. Rowen*, 2 L. D. 714.

<sup>2</sup> *Winscott v. N. P. R. R.*, 17 L. D. 274.

<sup>3</sup> *State of Washington v. McBride*, 18 L. D. 199; *N. P. R. R. v. Marshall*, 17 L. D. 545; *Sweeney v. N. P. R. R.*, 20 L. D. 394; *Rhodes v. Treas.*, 21 L. D. 502.

<sup>4</sup> *Etling v. Potter*, 17 L. D. 424; *Berry v. C. P. R. R.*, 15 L. D. 463.

<sup>5</sup> *Johns v. Marsh*, 15 L. D. 196; *Walton v. Batten*, 14 L. D. 54.

<sup>6</sup> *Public Domain*, 184.



it would seem that but little weight should be given to these returns. If the surveyor, in subdividing a township into sections, encounters a mine in active operation, we may find some mention of that fact in his field-notes; but usually he does not go beyond this. A fair illustration of the unreliability of these returns in this respect may be found in almost all the mineral districts over which the public surveys have been extended. We note the following caustic criticism of the land department itself on this subject. In an official communication (March 11, 1872) from Mr. Drummond, commissioner of the general land office, to Mr. Delano, secretary of the interior, the commissioner says:—

"To illustrate the unreliability of the surveyors' returns as to the character of these lands, and the absolute necessity for the rule which, with your advice and consent, I have adopted, it may be proper to refer in this connection to some of the applications for patents for mines in California, the lands embracing which were returned on the official township plats as agricultural in character, the existence of mines therein not becoming known to this office until after the receipt of such applications for mining title."

(Here follows a list of thirty-five mines.)

"The foregoing claims are all within the Sacramento district, and many more could be enumerated were it necessary to illustrate the want of reliability of the surveyor's returns as to the character of these lands. . . . But with the kind of returns furnished it is totally impossible to determine whether any given tract in the mineral district is properly agricultural land within the meaning of the law or not, or whether this office could, with a due regard for the execution of the law, proceed to patent such as agricultural land, without further investigation."

And in an earlier communication the same commissioner uses the following apt language:—

"I am impressed with the conviction that it is neither in harmony with the spirit or intent of the laws of



"congress, nor with the true public policy, to sanction the  
"indiscriminate absorption of the lands in what has here-  
"tofore been known as the reserved mineral belt in the  
"public domain under laws only applicable to lands clearly  
"non-mineral, simply because the deputy surveyors failed  
"to return the same as mineral in character. This view is  
"strengthened by the fact that very many, in fact the  
"majority, of the applications for mineral patents, are found  
"upon consulting our official township plats to be within  
"subdivisions not reported as mineral in character."<sup>1</sup>

In a circular letter issued in December, 1871, to the registers and receivers of land offices in the mining regions of California, instructing them to withhold from agricultural entry a large number of townships, the same commissioner thus expresses his views:—

"Experience having shown that this office can not with  
"any degree of safety judge of the character of these lands,  
"whether mineral or agricultural, from the data furnished  
"by such returns, and there being no authority of law for  
"the employment of a competent geologist to investigate  
"the matter, the head of the department has, in consid-  
"eration of the public interests and to prevent the indis-  
"criminate absorption of the mineral lands of the public  
"domain through the instrumentality of insufficient returns,  
"found it imperatively necessary to adopt the course herein  
"announced, both for the protection of those who have  
"already expended time, capital, and labor in opening and  
"developing these mines, and those of the citizens of the  
"United States who may hereafter desire to exercise their  
"legal right to do so."<sup>2</sup>

In the light of these conceded facts, it is a marvel that either the land department or the courts ever announced the doctrine that such returns were *prima facie* evidence of anything save their own inherent weakness and insufficiency for this purpose.

The question as to the effect of these returns was before the supreme court of the United States in a recent case,<sup>3</sup> in which Justice Field, delivering the opinion of the court, said:—

<sup>1</sup> Copp's Min. Decisions, 297.

<sup>2</sup> Barden v. N. P. R. R., 154 U. S. 288.

<sup>3</sup> *Id.*, 302.

"Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868, and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural, and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor-general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon.

"Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or to determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject."

#### § 107. Character of land, when and how established.

—The character of a given tract of land is always a question of fact, to be determined, generally speaking, by the land department, on hearings ordered for that purpose, or at the time patent is applied for, and the decision of the department, culminating in the issuance of a patent, is final.<sup>1</sup>

The precise point of time when the character of a given tract of land is to be determined will depend somewhat upon the nature of the right asserted, and the date to which it is supposed to relate. This subject will be fully discussed under appropriate heads, when considering the various congressional grants out of which mineral lands are reserved, and the various methods of acquiring public lands other than mineral, and in the chapter treating of the land department and its functions.

<sup>1</sup> *Pac. M. & M. Co. v. Spargo*, 8 Saw. 647; *Cowell v. Lammers*, 10 Saw. 255; *Barden v. N. P. R. R.*, 154 U. S. 288; *Gale v. Best*, 78 Cal. 235; *Dahl v. Mont. C. Co.*, 132 U. S. 264; *Dahl v. Raunbenn*, *Id.* 260; *Carter v. Thompson*, 65 Fed. 329.

## CHAPTER III.

### STATUS OF LAND AS TO TITLE AND POSSESSION.

#### ARTICLE I. INTRODUCTORY.

- II. MEXICAN GRANTS.
- III. GRANTS TO STATES FOR EDUCATIONAL AND INTERNAL IMPROVEMENT PURPOSES.
- IV. RAILROAD GRANTS.
- V. TOWNSITES.
- VI. INDIAN RESERVATIONS.
- VII. MILITARY RESERVATIONS.
- VIII. NATIONAL PARK AND FOREST RESERVATIONS.
- IX. HOMESTEAD AND OTHER AGRICULTURAL CLAIMS.
- X. OCCUPANCY WITHOUT COLOR OF TITLE.

#### ARTICLE I. INTRODUCTORY.

§ 112. Only public lands subject to appropriation under the mining laws.

**§ 112. Only public lands subject to appropriation under the mining laws.**—The mineral character of a given tract of land having been ascertained as a present fact, according to the rules enunciated in a preceding chapter, it becomes necessary to determine the status of the land as to title and possession before any legal right of appropriation under the mining laws can be asserted and maintained by the mineral claimant. Only public mineral lands can be entered under the mining laws. Land to which any claim or right of others has legally attached does not fall within the definition of “public land.”

While under the system in vogue on the continent of Europe, in Mexico, and the South American republics, mining privileges may be acquired in lands of private

proprieters under certain restrictions and governmental regulations, no such right exists in this country, and lands held in private ownership can not be invaded.<sup>1</sup> The land sought to be entered upon as mineral land must be free, open, public land, and not legally reserved, appropriated, dedicated to any other use or purpose, or otherwise legally disposed of. As to whether a given tract of land sought to be entered as mineral is free and open to acquisition under the mining laws, is sometimes a difficult question to solve. To enable us to intelligently deal with this subject, it will be necessary to examine the various methods by which the government parts with its title to its lands, its obligation under treaties of cession, the nature and extent of grants previously made, and the reservations of certain parts of its territory made for public purposes, pursuant to special laws.

## ARTICLE II MEXICAN GRANTS.

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|--|---|
| § 114. Ownership of mines under Mexican law.   | § 121. Grants <i>sub judice</i> .   |
| § 115. Nature of title conveyed to the United States by the treaty.                    | § 122. Different classes of grants.   |
| § 116. Obligation of the United States to protect rights accrued prior to the cession. | § 123. Grants of the first and third classes.   |
| § 117. Adjustment of claims to Mexican grants in California.                           | § 124. Grants of the second class - commonly called "floats."   |
| § 118. Adjustment of claims to Mexican grants in other states and territories.         | § 125. Grants confirmed under the California act.   |
| § 119. Claims to mines asserted under the Mexican mining ordinances.                   | § 126. Grants confirmed by direct action of congress.   |
| § 120. Status of grants considered with reference to condition of title.               | § 127. Grants which have been or may be, finally confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona. |
|  | § 128. Conclusions.   |

§ 114. Ownership of mines under Mexican law.— Under the laws in force in Mexico at the date of the

<sup>1</sup>Biddle Boggs v. Merced M. Co., 14 Cal. 476.

treaty of Guadalupe Hidalgo, mines, whether in public or private property, belonged to the supreme government.<sup>1</sup>

No interest in the minerals of gold and silver passed by a grant from the government of the land in which they were contained, without express words designating them. Such grant only passed an interest in the soil distinct from that of the minerals.<sup>2</sup>

The interest in minerals was conveyed through the operation of the mining ordinances, or by proceedings upon denouncement, when a mine, once discovered and registered, had been abandoned and forfeited.<sup>3</sup>

Mining rights under the Mexican laws were held upon conditions not affecting the title to the land as derived under the ordinary conveyances; and such rights might be acquired and held by others besides the owner of the land under the ordinary grants, and were terminable when, by their use, the minerals contained in the soil were wholly removed.<sup>4</sup>

In other words, there was a severance of the title to the minerals from the title to the land. The minerals, particularly gold, silver, and quicksilver, were *jura regalia*, and were considered to belong to the supreme government in virtue of its sovereignty.

This was substantially the law of the ceding country at the date of the ratification and exchange of the treaty.

**§ 115. Nature of title conveyed to the United States by the treaty.**—By the treaty of cession, all of the property theretofore belonging to Mexico within the limits defined by the compact between the two nations passed to the United States.<sup>5</sup>

The government of the United States was based upon different theories from that of the ceding country. By the

<sup>1</sup>Castillero v. United States, 2 Black, 17.

<sup>2</sup>Fremont v. Flower, 17 Cal. 199.

<sup>3</sup>Fremont v. Flower, 17 Cal. 199; United States v. San Pedro etc. Co. 17 Pac. 407; United States v. Castillero, 2 Black, 17.

<sup>4</sup>Castillero v. United States, 2 Black, 17.

<sup>5</sup>Fremont v. Flower, 17 Cal. 199.

operation of the treaty, none of the Mexican theories of government were ingrafted upon the American system. The ownership conferred by the cession was not an incident of sovereignty, and the United States hold the minerals and the lands in which they are found just as they hold any other public property which they acquired from Mexico.<sup>1</sup>

No foreign government could, by treaty or otherwise, impart to the United States any of its sovereign prerogatives; nor have the United States the capacity to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.<sup>2</sup>

§ 116. **Obligation of the United States to protect rights accrued prior to the cession.**—It is a matter of political history that within the territory ceded, particularly within the area now comprising the states of California and Colorado and the territories of New Mexico and Arizona, and to a limited extent, perhaps, in other states, rights were asserted to a large number of tracts of land by title derived from the ceding nation. These tracts varied in area from comparatively few acres to immense bodies of land, in some instances embracing principalities within their claimed boundaries. Most of these claimed grants were either grants for colonization or for the purposes of stock-raising and agriculture. A very few were for mines claimed to have been acquired under the mining ordinances. Most of them were inchoate—that is to say, something remained to be done to either perfect and establish the title or to fix the boundaries. Many were spurious and fraudulent. As to all these asserted rights, the treaty of Guadalupe Hidalgo imposed upon the government of the United States the obligation to protect titles acquired under Mexi-

<sup>1</sup> *Fremont v. Flower*, 17 Cal. 199.

<sup>2</sup> *Pollard v. Hagan*, 3 How. 212.

can rule.<sup>1</sup> This obligation was imposed upon our government by international law independent of treaty stipulation.<sup>2</sup>

These rights were consecrated by the law of nations.<sup>3</sup> A right of any validity before the cession was equally valid afterwards.<sup>4</sup> The duty of providing the mode of securing these rights and of fulfilling the obligations imposed upon the United States belonged to the political department of the government. Congress might either itself discharge that duty or delegate it to the judicial department.<sup>5</sup>

§ 117. **Adjustment of claims to Mexican grants in California.**—With reference to Mexican grants in California, congress provided for the appointment of a board of land commissioners,<sup>6</sup> to whom all persons claiming lands by virtue of any right or title derived from the Spanish or Mexican government were required to present their claims. The action of the commissioners was subject to review by the United States district court, and the right to appeal to the supreme court of the United States was given. Under this act most of the Mexican land grants in California were adjudicated, and patents issued for such as were ultimately confirmed. A similar method had been pursued with reference to grants claimed in the territory ceded by Spain and France.<sup>7</sup>

The government of the United States, when it came to consider this statute, was not without large experience in a somewhat similar class of cases arising under the treaties for the purchase of Florida from Spain and the territory

<sup>1</sup> *Peralta v. United States*, 3 Wall. 434; *Knight v. U. S. Land Assn.*, 142 U. S. 161.

<sup>2</sup> *Strother v. Lucas*, 12 Peters, 410.

<sup>3</sup> *United States v. Moreno*, 1 Wall. 400; 1 Wharton's Internat. Dig., § 4.

<sup>4</sup> *United States v. Moreno*, 1 Wall. 400; *Interstate L. Co. v. Maxwell L. G. Co.*, 139 U. S. 569.

<sup>5</sup> *Astiazaran v. Santa Rita L. & M. Co.*, 148 U. S. 80; *De la Croix v. Chamberlain*, 12 Wheat. 599; *Chouteau v. Eckhart*, 2 How. 344; *Tameling v. U. S. Freehold Co.*, 93 U. S. 644.

<sup>6</sup> Act of March 3, 1851, 9 Stats. at Large, 631.

<sup>7</sup> *Public Domain*, 375.



of Louisiana from France. In the latter case, particularly, a very much larger number of claims by private individuals existed to the soil acquired by the treaty, some of whom resided on the lands which they claimed, while others did not, and the titles asserted were as diverse in their nature as those arising under the cession from Mexico.<sup>1</sup>

§ 118. **Adjustment of claims to Mexican grants in other states and territories.**—As to claimed Mexican grants situated within the territory of New Mexico, congress, on July 22, 1854, passed an act<sup>2</sup> providing, among other things, that the surveyor-general for that territory should examine into and report to the interior department upon the status of private land claims within his jurisdiction. The provisions of this act were extended to Colorado by the act of February 28, 1861,<sup>3</sup> and to Arizona by the act of February 24, 1863.<sup>4</sup>

Some of the grants so reported upon under these acts were presented to congress, and were confirmed. But by far the greater proportion awaited the passage of some general law providing a uniform method of adjustment. Such a law was passed March 3, 1891.<sup>5</sup>

This act created a court of private land claims, consisting of a chief justice and four associate justices, to which tribunal all persons claiming lands within the limits of the territory derived by the United States from the republic of Mexico, and now embraced within the territories of New Mexico and Arizona, and the states of Nevada, Colorado, Wyoming, and Utah, are called upon to submit their claims.<sup>6</sup> This court has had submitted to it a large number of claimed grants. It has confirmed some, and rejected

<sup>1</sup> *Botiller v. Dominguez*, 130 U. S. 238.

<sup>2</sup> 10 Stats. at Large, 308.

<sup>3</sup> 12 Stats. at Large, 172.

<sup>4</sup> *Id.* 664.

<sup>5</sup> 26 Stats. at Large, 854.

<sup>6</sup> The California act required all classes of claimed grants to be presented, whether perfect or inchoate. The act of 1891 leaves it optional with the owner of a perfect grant to present it or not, as he sees fit.



others. Many are still being litigated. This act may be said to be drawn on lines parallel to the one passed for California, but, in one respect at least, it makes a radical innovation. The California act made no mention of or reference to mineral lands distinctively. The law under which the court of private land claims has been and is now acting contains the following provision:—

“No allowance or confirmation of any claim shall confer any right or title to any gold, or silver, or quicksilver mines, or minerals of the same, unless the grant claimed effected the donation or sale of such mines or minerals to the grantee, or unless the grantee has become otherwise entitled thereto in law or equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act. But no such mine shall be worked on any property confirmed by this act without the consent of the owner of such property, until specially authorized thereto by an act of congress hereafter passed.”

This is a radical departure from the previous policy of the government. All reservations heretofore made or authorized by congress, with the exception of “known mines,” in the pre-emption act of 1841, and “veins,” or “lodes,” in the townsite act of 1865, have been of the *lands* containing mineral, not the mineral within the lands. The effect of these new provisions and the construction of the patents to be issued under them will be duly considered at the proper time.

§ 119. **Claims to mines asserted under the Mexican mining ordinances.**—It may be conceded on the threshold that where a valid claim to a mine or a mining right existed prior to the cession within the territory ceded, such right must be respected, and may be determined in the same manner as claims to other land are determined.<sup>1</sup> We are not aware of any such claim ever having been thus far successfully established.

<sup>1</sup> *Castillero v. United States*, 2 Black, 17.

But few were ever asserted in California; and, of course, the time for such assertion has long since elapsed. From what we know of the history of mining in the remaining portion of the ceded territory, it is not likely that many such claims will be presented to the present court of private land claims. If such should be the case, and they are confirmed, the title to the minerals will, of course, pass. If they should not be confirmed, the tract claimed will be restored to the public domain, and, if mineral in character, will become public mineral lands, and subject to the mining laws. Therefore, we have no further concern with this hypothetical class of claims. We are to deal only with rights asserted to lands claimed either under the colonization laws of Mexico or for agricultural, pastoral, and kindred purposes.

**§ 120. Status of grants considered with reference to condition of title.**—So far as the inquiry is pertinent to the questions considered in this treatise, Mexican grants may be considered in four different aspects:—

- (1) Grants *sub judice*—that is to say, awaiting final confirmation and determination of boundaries;
- (2) Grants confirmed finally by action of the judicial tribunals under the California act, and the boundaries fixed;
- (3) Grants confirmed by direct action of congress;
- (4) Grants which have been, or may be, finally confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona.

Let us consider these in the order named.

**§ 121. Grants sub judice.**—With respect to all classes of Mexican grants, it may be said that they are *sub judice* until the title has been established and the boundaries finally defined by the tribunals charged with these functions, or the right is finally declared invalid and without foundation, or until the period fixed by the various acts

requiring presentation to the respective tribunals is passed, and no such presentation has been made.<sup>1</sup>

§ 122. **Different classes of grants.**— Mexican grants were of three kinds:—

(1) Grants by specific boundaries where the donee is entitled to the entire tract;

(2) Grants of quantity, as of one or more leagues within a larger tract, described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more;

(3) Grants of a place or rancho by name, where the donee is entitled to the whole tract, according to the boundaries given, or, if not given, according to the extent as shown by previous possession.<sup>2</sup>

§ 123. **Grants of first and third classes.**— With respect to lands containing mines or mineral deposits within the claimed exterior boundaries of any grant, falling within the first and third classes, it may be stated that no right to any such lands can be acquired under the general mining laws so long as the grant remains *sub judice*. Such lands are not “public lands” within the meaning of that term as used in the acts of congress respecting the disposition of the public domain.<sup>3</sup>

And it is immaterial whether the claim is *lawfully* made or not. As was said by the supreme court of the United States,—

<sup>1</sup> Under the California act all classes of grants, whether perfect or imperfect, were required to be presented. Under the act of March 3, 1891, the owners of *perfect* grants may present their claims or not, as they see fit. As to when such class of grants cease to be *sub judice* is a question. Even after the present court of private land claims goes out of existence, the status of these grants claimed as perfect and their extent may be the subject of controversy; and it may be said that they will perpetually remain *sub judice*, so far as the government is concerned. We do not think, considering the general scope of this treatise, that we are called upon to elaborate this question.

<sup>2</sup> *United States v. McLaughlin*, 127 U. S. 428; *Higuera v. United States*, 5 Wall. 827; *Hornsby v. United States*, 10 Wall. 224.

<sup>3</sup> *Cameron v. United States*, 148 U. S. 301; *Doolan v. Carr*, 125 U. S. 618.

"Claims, whether grounded upon an inchoate or perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected."<sup>1</sup>

The theory by which grants of the two classes under consideration were while *sub judice* withheld from appropriation under the general land laws of congress is thus stated by the same tribunal. —

"The right to make the segregation rested exclusively with the government, and could only be exercised by its officers. Until they acted and effected the segregation, the confirmees were interested in preserving the entire tract from waste and injury and in improving it, for until then they could not know what part might be assigned to them. Until then, no third person could interfere with their right to the possession of the whole. No third person could be permitted to determine in advance of such segregation that any particular locality would fall within the surplus, and thereby justify his intrusion upon it and its detention from them. . . . If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction, and then in another, each intruder asserting that the parcel occupied by him fell within the surplus, until in the end they would be excluded from the entire tract."<sup>2</sup>

This was the doctrine early announced by the supreme court of the state of California, and maintained through a long line of decisions.<sup>3</sup>

<sup>1</sup> *Newhall v. Sanger*, 42 U. S. 761, 764.

<sup>2</sup> *Van Reynegan v. Bacon*, 95 U. S. 33-36, (citing *Cornwall v. Cuyver*, 16 Cal. 429; *Mahoney v. Van Winkle*, 21 Cal. 552; *Riley v. Hirsch*, 18 Cal. 198).

<sup>3</sup> *Perris v. Coover*, 10 Cal. 589; *Mahoney v. Van Winkle*, 21 Cal. 552; *Thornton v. Mahoney*, 24 Cal. 569; *Rieh v. Maples*, 33 Cal. 102; *Mott v. Reyes*, 45 Cal. 379; *Shanklin v. McNamara*, 87 Cal. 371.

It has been said that the primary object of the act of March 3, 1851, to ascertain and settle the private land claims in the state of California, was to distinguish the vacant public lands from those that were private property.<sup>1</sup>

Until a confirmation of a grant, no valid title as against the United States is vested to any specific land. Nor does a confirmation locate the claim and sever the land from the public domain without a survey.<sup>2</sup>

Until such confirmation and final survey, lands within the claimed limits were reserved from the operation of the general land laws, and no title to any portion could be obtained under the pre-emption or other laws.

When the limits have been definitely fixed the surplus for the first time becomes open to settlement and purchase.<sup>3</sup> A like result follows in cases where the grant is finally rejected, or where the claimant fails to present his claim within the time specified in the act.<sup>4</sup>

§ 124. **Grants of the second class, commonly called "floats."**—Do the foregoing rules apply to cases falling within the second class of grants, commonly called "floats"?—for example, a grant of ten square leagues within claimed exterior boundaries of one hundred square leagues. This was the case of the Mariposa grant in California, claimed and ultimately confirmed to General John C. Fremont.

The decisions heretofore quoted and the rules enunciated applied to conditions antedating the enactment of general mining laws. Prior to July 26, 1866, no mineral lands, even on the unquestioned public domain, could be acquired in absolute private ownership. The various acts passed from 1851 to 1891 regulating the settlement of private land claims made no mention of minerals or mineral lands.

The California act, in terms, reserved these claimed lands from pre-emption and homestead settlement.

<sup>1</sup> *Castro v. Hendricks*, 23 How. 438.

<sup>2</sup> *Ledoux v. Black*, 18 How. 473.

<sup>3</sup> *United States v. McLaughlin*, 127 U. S. 428; *Quinn v. Chapman*, 111 U. S. 445.

<sup>4</sup> *Botiller v. Dominguez*, 130 U. S. 238; *United States v. Fossat*, 21 How. 446.

The acts conferring authority upon surveyors-general in the territories to examine and report upon Mexican grants contained a provision to the effect that "until final action of congress on such claims, all lands covered thereby shall be reserved from sale or other disposition by the government."

Would these inhibitions imply that lands lying within the claimed exterior boundaries of a float were not open to exploration and purchase, as lands containing gold and silver? Confessedly, titles to these minerals could not have been obtained under the Mexican government by proceedings other than under the mining ordinances; and it can be plausibly asserted that the United States are under no legal or equitable obligation to confer upon these grantees something more than they could have acquired had there been no change in the paramount proprietorship.

And yet we fail to see anything in the adjudicated cases which would not reserve the entire claimed tract from occupation and purchase under the mining laws until such time as the boundaries are finally fixed and the surplus becomes public domain.

The supreme court of the United States thus distinguishes this class of grants:—

"It is in the option of the government, not of the grantee, to locate the quantity granted; and, of course, a grant by the government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the government has the right to say where it shall be located, it certainly has the right to say where it shall not be located, and if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains eighty leagues, and the quantity granted is only ten leagues, the government may dispose of seventy leagues without doing any wrong to the original grantee."<sup>1</sup>

<sup>1</sup> United States v. McLaughlin, 127 U. S. 428.

The case was that of a railroad grant evidenced by patent for a section of land within a float. Suit was brought to vacate the patent on the ground that the land patented was at the time of the patent embraced within the exterior boundaries of a claimed Mexican grant, then *sub judice*, and that therefore the patent was void, relying upon the case of *Newhall v. Sanger*,<sup>1</sup> which involved precisely the same grant, although, as presented for the consideration of the supreme court in that case, it appeared to be a grant by specific boundaries, and not a float.

The case of *United States v. McLaughlin* established the doctrine that the government might, by *direct congressional grant*, dispose of lands within a float so long as sufficient remained to satisfy the call of the grant for quantity. This rule was subsequently reannounced, and followed in later cases.<sup>2</sup>

But, as we understand the *McLaughlin* case, the court did not intend to infer that any such lands were subject to appropriation *under general laws*. In fact, the court says:—

“It may be that the land office might properly suspend “ordinary operations in the disposal of lands within the “territory indicated; and in that sense they might not be “considered as public lands.”

We think a review of the authorities justifies the conclusion that floats are not exceptions to the general doctrine that Mexican grants while *sub judice* are to the extent of their claimed exterior boundaries, as defined in the *expediente*, withdrawn from exploration and purchase under the general mining laws; and this is true wheresoever within the ceded territory these grants are found.

**§ 125. Grants confirmed under the California act.**—As to grants confirmed finally, with boundaries fixed by action of the judicial tribunals, under the California act, such grants occupy the status of patented lands, and will

<sup>1</sup> 92 U. S. 761.

<sup>2</sup> *Carr v. Quigley*, 149 U. S. 652; *Wis. Cent. R. R. v. Forsythe*, 159 U. S. 48; *United States v. Curtner*, 38 Fed. 1; *Grant v. Oliver*, 91 Cal. 158.



be so considered. A right to a patent is equivalent to a patent issued.

The question as to whether mines of the precious metals passed by confirmation to a granteo of a Mexican grant has never been in terms judicially determined by the supreme court of the United States.

In the case of the Mariposa grant,<sup>1</sup> General Fremont's right to confirmation was assailed upon the ground that the grant embraced mines of gold or silver. The supreme court of the United States confirmed the grant, holding that the only question before it was the validity of the title, that, under the mining laws of Spain and Mexico, the discovery of a mine did not destroy the title of the individual to the land granted; that whether there were any mines on the grant in question, and, if there were, what were the rights of sovereignty in them, were questions which must be decided in another form of proceeding, and were not subjected to the jurisdiction of the commissioners or the court by the act of 1851. But in the later case of the New Almaden quicksilver mine,<sup>2</sup> a direct application for confirmation of a mining title was made, and the same court, while denying the validity of the asserted right, held that rights to mines acquired from Spain and Mexico prior to the cession were interests in land, and as such were subject to the jurisdiction of the commissioners. The Fremont case was not mentioned by the court, although in the court below (Judge Hoffman), sustaining the jurisdiction, held that the rule announced by him was not in conflict with the Fremont case, the only question there being the validity of the grant.

After the patent was issued to Fremont, the question arose in the California courts as to whether the minerals of gold and silver discovered within the grant passed to the confirmer under the patent, and the supreme court of that state thus announced its conclusions:—

<sup>1</sup> *Fremont v. United States*, 17 How. 442, 476.

<sup>2</sup> *Castillero v. United States*, 2 Black, 17.



“ The United States occupy, with reference to their real  
“ property within the limits of the state, only the position  
“ of a private proprietor, with the exception of exemption  
“ from state taxation, and their patent of such property  
“ is subject to the same general rules of construction which  
“ apply to conveyances of individuals. From the opera-  
“ tion of conveyances of this nature—that is, of individ-  
“ uals,—the minerals of gold and silver are not reserved,  
“ unless by express terms. They pass with the transfer  
“ of the soil in which they are contained. And the same  
“ is true of the operation of the patent, the instrument of  
“ transfer of the governmental proprietor, the United States;  
“ no interest in the minerals remains in them without a  
“ similar reservation.

“ The United States have uniformly regarded the patent  
“ as transferring all interests which they could possess in  
“ the soil, and everything imbedded in or connected there-  
“ with. Wherever they have claimed mines, it has been  
“ as part of the *lands* in which they were contained; and  
“ whenever they have reserved the minerals from sale  
“ or other disposition, it has only been by reserving the  
“ lands themselves. It has never been the policy of the  
“ United States to possess interests in land in connection  
“ with individuals.”<sup>1</sup>

This doctrine seems logical. We are not aware of its ever having been seriously questioned. It was commented on and distinguished by the supreme court of New Mexico in a case involving a patent issued under a special act of congress, confirming a grant,<sup>2</sup> to be hereafter discussed; but we do not think its force has been destroyed or weakened.

Unquestionably, the United States might have said to these claimants: “ The title asserted by you as the grantee  
“ of the Mexican government did not convey to you the  
“ right to the minerals of gold, silver, or quicksilver which  
“ are within your claimed grant. It is not our purpose to  
“ convey to you lands containing these metals; and before  
“ any title is bestowed upon you by this government, you  
“ must demonstrate that the lands are non-mineral in char-

<sup>1</sup> *Fremont v. Flower*, 17 Cal. 199; *Moore v. Smaw*, *Id.* See, also, *Ah Hee v. Crippen*, 19 Cal. 492; *Biddle Boggs v. Merced M. Co.*, 14 Cal. 279; *Manning v. San Jacinto Tin Co.*, 7 Saw. 419.

<sup>2</sup> *United States v. San Pedro*, 17 Pac. 337.

"acter. If mineral lands are found within your boundaries, " they must be segregated out, as in the case of pre-emption, " homestead, and other classes of grant, and you will be " given a title to the remainder."

Or it might have gone farther, and offered a title reserving all minerals, as it has attempted to do in the later act applicable to Colorado, New Mexico, and Arizona. But the government imposed no such conditions as to grants in California. Its patent passed everything it had acquired from the Mexican government, and the United States ceased to have any further concern with the land or its constituent elements.

A patent issued upon a confirmed Mexican grant passes whatever interest the United States may have had in the premises.<sup>1</sup> It operates, in consequence, as an absolute bar to all claims under the United States having their origin subsequent to the petition for confirmation. It is, in effect, a declaration that the rightful ownership never had been in the United States, but at the time of the cession it had passed to the claimant or those under whom he claimed.<sup>2</sup>

If the grantee received more than he could have acquired from the Mexican government, it is not a matter concerning which outsiders may lawfully complain. The United States might confirm and patent a Mexican grant for a much larger quantity of land than it was possible to be obtained under the Mexican law.<sup>3</sup>

Why did it not possess the same power with reference to the minerals? Possessing that power, it exercised it by issuing a patent containing no reservation. As a matter of fact, the California act did not authorize the insertion of a reservation; and if a patent issued under that law contained such, it would have been to that extent void, as being unauthorized.<sup>4</sup>

<sup>1</sup> *Beard v. Federy*, 3 Wall. 478; *Adam v. Norris*, 103 U. S. 591; *More v. Steinbach*, 127 U. S. 70; *Henshaw v. Bissel*, 18 Wal. 255.

<sup>2</sup> *Adam v. Norris*, 103 U. S. 591, and cases therein cited.

<sup>3</sup> *United States v. Maxwell, L. G. Co.*, 121 U. S. 325.

<sup>4</sup> *Daffelback v. Hawke*, 115 U. S. 392; *Amador-Medean G. M. Co. v. S. Spring Hds.*, 13 Saw. 523; *Smokehouse Lode Cases*, 6 Mont. 397; *Clary v.*

§ 126. **Grants confirmed by direct action of congress.**—We are aware of no principle of law which permits us to draw distinctions between the legal effect of a patent issued under an act of congress, directly confirming a grant, and one issued as a result of an investigation by tribunals created by congress for that purpose. We should not have divided the question, and placed direct congressional confirmation in a separate category, were we not confronted by a very able and thoughtful opinion promulgated by the supreme court of New Mexico,<sup>1</sup> wherein that court announces the doctrine that an act of congress confirming to a claimant his title to a tract of land granted to him by the Mexican government under the colonization laws of Mexico and Spain, and a patent issued in accordance therewith, conveys no title to the mineral lands included in such grant.

The record in this case is very voluminous, and the opinion of the court lengthy. An epitome of the facts, the issues raised, and conclusions reached by the court are essential to a proper consideration of the force and value of the decision as a precedent. The confirmatory act in question is very short, and for convenience' sake we quote it:—

“Be it enacted, . . . That the grant to José Serafin “Ramirez, of the Cañon del Agua, as approved by the “surveyor-general of New Mexico, January 20, 1860, and “designated as number seventy in the transcript of private “land claims in New Mexico, transmitted to congress by “the secretary of the interior, January 11, 1861, is hereby “confirmed; *provided*, that this confirmation shall only be “construed as a relinquishment on the part of the United “States, and shall not affect the adverse rights of any persons whomsoever.”<sup>2</sup>

A patent was issued pursuant to this confirmation, describing the grant by metes and bounds, as shown in the

Hazlitt, 67 Cal. 286; Silver Bow M. & M. Co. v. Clarke, 5 Mont. 378; Wolfley v. Lebanon M. Co., 4 Colo. 112.

<sup>1</sup> United States v. San Pedro and Cañon del Agua Co., 4 N. M. 225.

<sup>2</sup> 12, 1866), 14 U. S. Stats. at Large, 588.

field-notes of the approved survey, containing no reserving or excepting clauses other than the one provided for in the act

The grant, as patented, included within its exterior boundaries rich and valuable mines of gold, silver, iron, copper, and lead, some of which were worked prior to the treaty of cession by Mexican citizens. Others were thereafter discovered, occupied, and developed by American citizens, it being generally understood that they were situated upon the public domain, and not upon private property.

Suit was brought by the government to vacate and annul the patent, on the ground that the claimant had, by a fraudulent conspiracy with the surveyor-general, his clerk, the deputy surveyor, and other persons, secured a survey of said claimed grant which included land not covered nor intended to be conveyed by the Mexican government; that this fraudulent survey, upon which the patent was based, embraced the mines, whereas a proper construction of the terms of the grant, as presented for confirmation, would have excluded them.

There was an abundance of evidence to substantiate the fraudulent character of the survey, and to sustain the ruling of the supreme court of New Mexico setting aside and annulling the patent.

But a supplemental bill had been filed in the trial court without objection which raised another legal issue. It was therein alleged as follows:—

"That said defendant is now, and has been, in possession of large portions of said tract of land mentioned and described in said original bill of complaint as being the property of the United States, and by said fraudulent survey now included and embraced within the boundaries mentioned and described in the patent of the United States, as set forth in said bill of complaint; and that said defendant is now in possession of many mines, leads, lodes, and veins of mineral-bearing quartz or rock belonging to the United States, and situated upon said tract of land, the property of the United States. The said mines, leads, lodes, and veins are very rich and valuable for gold,

“silver, copper, and other ores. That said defendant claims said land, with its mines, leads, lodes, and veins of mineral-bearing rock and mineral deposits, by and under said patent of the United States.”

This was followed by a prayer for an injunction prohibiting the defendant from mining or appropriating the ores.

Upon this issue, although the supreme court of New Mexico had determined that the patent, having been fraudulently obtained, was null and void, and therefore conveyed nothing, felt constrained to go farther, and enunciate the doctrine that, even if valid, the patent did not convey the minerals, and granted an injunction.

If the conclusion of the court was correct, and it undoubtedly was, that a proper survey made under the grant would exclude the mines, it was quite evident that the United States had a right to prevent the claimant from wasting the substance of its property by extracting and removing the metal-bearing ores, and an injunction was very properly sought, evidently upon this theory. It was quite unnecessary, in order to support the judgment awarding the injunction, to hold that the minerals did not pass by the patent. Therefore, all that the court said with reference to minerals not passing by the patent, which they had declared to be void, and to have passed nothing, was *obiter*, and wholly unnecessary.

The reasoning of the court on this branch of the case rests upon the assumption that as the claimant under the grant could not have obtained from the Mexican government the right to the minerals, therefore he could not demand them from the United States. But this is not the question at issue. The question is, What did the patent, assuming it to have been valid, convey?

In speaking of the California cases of *Moore v. Smaw* and *Fremont v. Flower*, heretofore cited, the court says that a careful study of these cases will prove that there were circumstances in the grant confirmation indicating an intent not disclosed in the *Cañon del Agua* case. A thorough knowledge of the *Mariposa* grant, its history, and the

various judicial controversies arising out of it between the mineral claimants and the grantees under the Mexican government, enables us to assert that there are no differences in essential characteristics between the two grants. Neither asserted title under the mining ordinances. (One was for colonization purposes, and the other for pastoral. The patent in one case was issued on a confirmation made by special act of congress, and in the other on a confirmation made by tribunals especially created by congress for that purpose.

The Cañon del Agua case was appealed to the supreme court of the United States, where the judgment of the supreme court of New Mexico was affirmed;<sup>1</sup> but the question as to whether the patent, if valid, carried the right to the mines was neither discussed nor decided.

With all due deference to the supreme court of New Mexico, we think we are justified in the conclusion that its decision in the Cañon del Agua case does not militate against the doctrine of the California cases, nor weaken the force of the line of decisions on the subject of patents to confirmed Mexican grants reviewed in the preceding paragraphs.

The decision in *Fremont v. Flower* was written by Judge Field. It has always stood unquestioned. As was said by Dr. Raymond in a recent monograph,—

"That a United States patent for land passes to the patentee (in the absence of explicit reservations authorized by law) all the interest of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed, or fixed to its surface—in short, everything embraced within the term 'land,'—was declared long ago in the cases arising out of the Mexican land grants in California (See *Fremont v. Flower*, 17 Cal. 199, and other cases.) The very acute and sound decisions of the supreme court of California in these cases (the chief credit for which is due to Stephen J. Field, now on the bench of the United States supreme court) may be said to have placed upon indestructible foundations the public land system of the United States,

<sup>1</sup> 136 U. S. 120



“the corner-stone of which is the completeness and invulnerability of the title of the patentee. It is worthy of notice, that in these cases the land in question had been granted by the Mexican government, with reservation of the precious metals, the deposits of which that government has always claimed to own, and the ownership of which therefore passed, under treaty, unimpaired by the agricultural grants, to the United States. Nevertheless, it was held that, in confirming the Mexican grants and issuing its patents for the territory, the United States actually conveyed to the patentees rights which they had never obtained from Mexico, on the broad principle that the unqualified grant of a patent for ‘land’ gives all. In other words, though the United States might have reserved the mineral right, it could only have done so in explicit terms, failing which, all its interests passed with its patent. The wisdom of this timely decision is universally admitted. Unquestionably it saved us from an intolerable chaos and confusion.”<sup>1</sup>

Before leaving this subject, it may be well to invite attention to another class of grants made by congress, in satisfaction of rights asserted, having their origin under the Mexican rule. In several instances, in recognition of equities, congress has authorized claimants to select certain lands in lieu of those originally claimed. This authorization is generally accompanied with a restrictive clause prohibiting the selection of mineral lands. Under these conditions, the land department administers the grant, and necessarily in doing so passes upon the character of the land. The duty devolves upon the claimant to establish the non-mineral character of the lands selected.<sup>2</sup>

Should any lands be included within the selection which are determined, *as a present fact*, to be mineral in character, as that term is defined and understood by the land department and the courts, a segregation would be required as to such lands, and patent would issue for the remainder.

Such patent when issued would be conclusive that the

<sup>1</sup> The Force of the United States Mineral Land Patent, Mineral Industry, vol. iv., p. 781.

<sup>2</sup> Baca Float No. 3, 13 L. D. 624.

land was non-mineral and it could not be thereafter collaterally assailed.<sup>1</sup>

§ 127. Grants which have been, or may be, finally confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona.—As we have heretofore said with reference to this class of grants, the government has made a radical departure from its established policy. It proposes to absolutely reserve not only mines of gold, silver, and quicksilver, which might be held to apply to known or opened mines, but the reservation extends to the minerals of this class. In effect, with reference to lands falling within this category, the government establishes the rules of law in force in Mexico at the time of the treaty of cession, and adopts the regalian doctrine prevalent under the civil and common law and in the different countries of Europe.

It is so opposed to the antecedent policy of the government, so inconsistent with all its legislation during the last half-century, at least, and so thoroughly inconsistent with the land system which prevails in other portions of the public land states and territories, that we hardly know how to deal with it. These provisions of the law looking to the the reservation of the minerals of gold, silver, and quicksilver fairly bristle with legal interrogation marks.

What are mines of gold and silver?

In the great case of mines (the Queen *v.* the Earl of Northumberland), it was held that mines of the baser metals, such as copper and lead, which contained gold or silver, were royal mines, and were reserved to the crown; and it required acts of parliament in the reign of William and Mary to change this rule.

To what extent may the government utilize this privilege, and enjoy the reserved estate? Certainly it can not

<sup>1</sup> *Carter v. Thompson*, 65 Fed. 329; *Dahl v. Raunheim*, 112 U. S. 260; *Steel v. Smelting Co.*, 106 U. S. 447; *Cowell v. Lammers*, 10 Saw. 247; *Manning v. San Jacinto Tin Co.*, 7 Saw. 419; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636; *Butte & B. M. Co. v. Sloan*, 47 Pac. 217; *L. L.*, 16 Mont. 97; *Gale v. Best*, 78 Cal. 235.



extend the operation of the general mining laws over the patented grants. The act does not sanction the carving out of any defined quantity of surface area to be used in connection with mining operations. If we are left to the rule applicable in cases of individuals, it could occupy only so much of the surface as was necessary in the usual and reasonable course of working;<sup>1</sup> and this would necessarily vary in each particular instance, dependent upon the character of the ore and its mode of occurrence. Neither the government nor its licensees could condemn rights of way or surface ground for mining purposes under the law of eminent domain; for mining is not a governmental function, nor is it a public use. Besides, the right of eminent domain is a right of municipal sovereignty, to be exercised in accordance with the rules prescribed by the individual states. It is true that the act contains the saving grace which inhibits any one without the consent of the owner of the grant from working the mines "until specially authorized thereto by an act of congress, to be hereafter passed," thus preventing a general invasion by enterprising explorers of the possession of the grant-owner, and giving congress an opportunity to readjust its legislation in this behalf, to harmonize with the established policy of the government.

We do not see why a preliminary investigation as to the character of the land embraced within a claimed grant should not be authorized, and the mineral lands segregated, as in the case of railroad grants, homestead entries, and donations to states for educational purposes. If it is objected that a surface examination might not disclose the mineral possibilities, the answer is that such is often the case with other classes of titles on the public domain. A discovery of mineral upon lands after they have been patented under the homestead, townsite, railroad, school, or other grants, would not defeat the patent or enable the government, or any one else, to abridge the right of the

<sup>1</sup> MacSwinney on Mines, 282; Stewart on Mines, 33.

patentee to the land granted, or sanction an intrusion upon his possession.<sup>1</sup>

We cannot see the propriety of adopting one policy with reference to by far the greater portion of the public domain, and another one, based on different theories, applicable to the remainder. While it may not be fairly within the author's privilege to speculate as to what troubles may arise, or what difficulties may be encountered in executing the act in question, we are very much inclined to believe that the reservation, in the form as now contemplated, will be a serious annoyance to both the government and the grant-owner, without any compensating features.

§ 128. **Conclusions.**—From the foregoing exposition of the law, we are authorized to deduce the following conclusions:—

(1) No right can be acquired under the general mining laws to any mineral lands lying within the claimed boundaries of any Mexican grant, so long as the grant remains *sub judice*.

(2) Lands lying within the exterior boundaries of a claimed grant are restored to the public domain, and become open to exploration and purchase under the mining laws, either (a) when the grant is finally rejected, or (b) where the claimant fails to present his claim for confirmation within the time fixed by law.

(3) In case of floats, the surplus remaining after satisfaction of the grant becomes public domain when the action of the tribunals fixing the boundaries becomes final.

(4) Final confirmation of a grant, and the patent issued pursuant thereto, convey to the grantee all the minerals, except as to grants falling within the jurisdiction of the court of private land claims created by the act of March 3,

<sup>1</sup>Cowell v. Lambers, 10 Saw, 246; Colo. C. & I. Co. v. United States, 123 U. S. 307; Pac. Coast M. & M. Co. v. Spargo, 8 Saw 645; Richards v. Dower, 81 Cal. 44; Cooper v. Roberts, 18 How. 173; Davis v. Weibold, 139 U. S. 507; McCormick v. Sutton, 97 Cal. 373; Smith v. Hill, 89 Cal. 122.

1891. As to the latter class of grants, the reserved minerals within the confirmed boundaries are preserved in *statu quo* until congress devises some means of disposing of them. Under the present state of the law, none of this last class of confirmed grants can be invaded for the purposes of mineral exploration, nor can any rights be initiated within their boundaries, under the general mining laws. A locator on such lands would be a naked trespasser, and could be ejected by the owner of the grant.

### ARTICLE III. GRANTS TO THE STATES FOR EDUCATIONAL AND INTERNAL IMPROVEMENT PURPOSES.

§ 132. Grant of sixteenth and thirty-sixth sections.	time to which the inquiry is addressed is the date when the asserted right to a particular tract accrued, and not the date upon which the law was passed authorizing the grant.
§ 133. Indemnity grant in lieu of sixteenth and thirty-sixth sections lost to the states.	
§ 134. Other grants for schools and internal improvements.	
§ 135. Conflicts between mineral claimants and purchasers from the states.	§ 141. Test of mineral character applied to school land grants.
§ 136. Mineral lands excepted from the operation of grants to the states.	§ 142. When grants to the sixteenth and thirty-sixth sections take effect.
§ 137. Restrictions upon the definition of "mineral lands," when considered with reference to school land grants.	§ 143. Selections by the state in lieu of sixteenth and thirty-sixth sections, and under general grants.
§ 138. Petroleum lands.	§ 144. Effect of surveyor-general's return as to character of land within sixteenth and thirty-sixth sections, or lands sought to be selected in lieu thereof, or under floating grants.
§ 139. Lands chiefly valuable for building-stone.	
§ 140. In construing the term "mineral lands," as applied to administration of school land grants, the	§ 145. Conclusions.

§ 132. Grant of sixteenth and thirty-sixth sections.  
—The ordinance of May 20, 1785, "for ascertaining the

"mode of disposing of the lands in the western territory," contained the following provision.

"There shall be reserved the lot number sixteen of every township for the maintenance of public schools within said township."

This was an endowment of six hundred and forty acres of land in each township, equivalent to one thirty-sixth of the entire public domain.<sup>1</sup>

This reservation was thereafter specially provided for in the organization of each new state up to the time of the formation of Oregon territory. In the act creating this territory,<sup>2</sup> an additional grant of the thirty-sixth section in each township was provided for, for the use of the future state, and ever since that date every new state, upon its admission to the union, has received a donation of the sixteenth and thirty-sixth sections, or twelve hundred and eighty acres, in each township. Reservations of these sections have likewise been made in all the territories, to be granted and confirmed to such new states as may be carved out of them.<sup>3</sup>

**§ 133. Indemnity grant in lieu of sixteenth and thirty-sixth sections lost to the states.**—Upon extending the surveys over the public lands in the various states, it was discovered that in many instances a sixteenth or thirty-sixth section, and sometimes both, in numerous townships were lost to the state, that is, by reason of a prior legal occupancy or settlement, or an antecedent grant, appropriation, or reservation, it was impossible for the grant as to these sections to take effect. In such cases the sections were said not to be *in place*. To remedy this, and compensate the state for the loss thus occurring, congress enacted laws granting indemnity; that is, the state was authorized to select other unoccupied and unreserved public lands within its boundaries *in lieu* of the sixteenth or thirty-sixth sections so lost to the state.

<sup>1</sup> Public Domain, 224.

<sup>2</sup> Public Domain, 223.

<sup>3</sup> August 14, 1848, 9 Stats. at Large, 323.

§ 134. **Other grants for schools and internal improvements.**—In addition to the grant of sixteenth and thirty-sixth sections, and lands in lieu thereof, where they are lost to the state, congress has from time to time made other grants to the several states, not of any designated sections or townships, but of a given quantity of land, to be selected from the body of the public domain.

On September 4, 1841,<sup>1</sup> congress granted to each of the public land states then admitted, and to each new state to be thereafter admitted, five hundred thousand acres of public lands for internal improvements, to be selected from the body of the public lands within the respective states. This is commonly called “the five-hundred-thousand-acre grant.”

A grant was also made to each of the public land states of two townships, or forty-six thousand and eighty acres, for university purposes, the grant to be satisfied by selection of unoccupied and unappropriated public lands within the respective states.

A further grant was made to the various states of the union, to those containing no public lands as well as to those which were essentially public land states.<sup>2</sup> This grant, commonly called “the agricultural college grant,” was of thirty thousand acres for each senator and representative to which the state was entitled under the apportionment of 1860.<sup>3</sup> In the public land states, the grant was to be satisfied by selection of public lands within their respective boundaries. To the states wherein there was no public land, scrip was issued, commonly known as “agricultural college scrip.” This scrip could be located anywhere on the unreserved and unappropriated public domain in any state, and could be used in the payment of pre-emption or commuted homestead entries. It was sold to speculators and individuals, who subsequently utilized it by locating it on lands subject to private entry.

<sup>1</sup> 5 Stats. at Large, 453.

<sup>2</sup> Public Domain, 229.

<sup>3</sup> July 2, 1862, 12 Stats. at Large, 503.

Congress also made other donations of a similar character, but we have here given a sufficient outline of grants to states to enable us to discuss their operation and effect with reference to mineral lands on the public domain.

**§ 135. Conflicts between mineral claimants and purchasers from the states.** - In administering grants of such extensive character, it is quite natural that conflicts should arise between the miner and the purchaser of state lands, particularly in the mineral regions of the west. These controversies found their way into the courts and the land department, and, as a result, certain principles of law have been announced which may be best presented by first considering the character of the lands which could pass by the grant, and at what time the respective grants take effect and become operative as to particular tracts.

**§ 136. Mineral lands excepted from the operation of grants to the states.** - Some of the grants to the states in terms reserved mineral lands from their operation. This was the case with the agricultural college grant, which contained the reservation "that no mineral lands shall be selected or purchased under the provisions of this act." And the grant of seventy-two sections to the state of California for seminary purposes<sup>1</sup> contained a similar clause. Kindred exceptions were inserted in all the more recent grants; but in some of the earlier ones, notably those donating sixteenth and thirty-sixth sections, and the five-hundred-thousand-acre grant, the law was silent as to mineral lands. But, as we have already seen, the uniform policy of the government prior to the enactment of the general mining laws was to reserve mineral lands from sale, pre-emption, and all classes of grants.<sup>2</sup> Of course, since the passage of the mining laws, title to mineral lands can be obtained only under these laws.

In California, the supreme court of that state early

<sup>1</sup> 10 Stats. at Large, 244.    <sup>2</sup> See, *ante*, § 47, and cases there cited.

announced the doctrine in reference to the grant of sixteenth and thirty-sixth sections, that, as there was no statement in the act of any condition, exception, reservation, or limitation, mineral lands were not withdrawn from the operation of the act, but passed to the state.<sup>1</sup> But this case was subsequently overruled.<sup>2</sup>

The supreme court of Nevada, in construing a similar grant to that state, held that mineral lands within sections sixteen or thirty-six did not pass; but the decision was based upon an estoppel upon the part of the state by reason of the passage by congress of an act concerning certain lands granted to the state, which act provided that in all cases lands valuable for mines of gold, silver, quicksilver, or copper should be reserved from sale.<sup>3</sup> The legislature of the state accepted the grants subject to this clause.<sup>4</sup> And the court very properly held that by reason of this acceptance the state was estopped from asserting title to mineral lands found within the sixteenth and thirty-sixth sections.<sup>5</sup>

The land department, in recent years at least, by a uniform line of decisions, has held that mineral lands did not pass to the state under the school grants.<sup>6</sup>

The supreme court of the United States had this question under consideration in reference to the grant of sixteenth and thirty-sixth sections to the state of Michigan, in *Cooper v. Roberts*,<sup>7</sup> where it was held that mineral lands passed by the grant, even as against a license from the government to search for and extract lead and other ores. The grant in question became operative at a period

<sup>1</sup> *Higgins v. Houghton*, 25 Cal. 252. See, also, *Wedekind v. Craig*, 56 Cal. 642.

<sup>2</sup> *Hermocilla v. Hubbell*, 89 Cal. 38.

<sup>3</sup> 14 Stats. at Large, p. 85, § 5.

<sup>4</sup> Nev. Stats. (1867), 57; Comp. Laws Nevada, vol. ii., §§ 3835, 3836, 3837.

<sup>5</sup> *Heydenfeldt v. Daney G. & S. M. Co.*, 10 Nev. 290.

<sup>6</sup> *In re Hogden et al.*, 1 Copp's L. O. 135; Copp's Min. Decisions, 30; *The Keystone Case*, *Id.*, 105, 109, 125; *In re Le Franchi*, 3 L. D. 229; *Keystone Lode v. State of Nevada*, 15 L. D. 259; *State of California v. Poley*, 4 Copp's L. O. 18; *In re Chas. Norager*, 10 Copp's L. O. 54.

<sup>7</sup> 18 How. 173.



prior to the discovery of gold in California, and at a time when the policy of leasing lead mines by the government was in force.<sup>1</sup>

But at a later period the question was again brought before the supreme court of the United States in the case of the *Ivanhoe M. Co. v. Keystone M. Co.*,<sup>2</sup> and the doctrine was finally established that congress in making these grants to the states did not intend to depart from the uniform policy theretofore adopted in reserving mineral lands from sale, and that mineral lands found within a sixteenth or thirty-sixth section, known to be such at the time the grant took effect, did not pass to the state.

It may be observed that in the *Ivanhoe-Keystone* case no mention is made of the *Michigan* case.

The rule having been thus announced, it follows as a corollary that no lands can be selected or located in satisfaction of *any* of the grants to the states which at the time of the proposed selection are known to be mineral lands.<sup>3</sup>

§ 137. **Restrictions upon the definition of "mineral lands," when considered with reference to school land grants.** In a preceding chapter, we have endeavored to establish a general definition of the term "mineral lands," as that term is used in the various mining acts of congress; and we have also attempted to formulate definite rules of statutory construction to be applied to such acts and these terms when found therein.<sup>4</sup>

Thus, we have heretofore said<sup>5</sup> that the word "mineral," as used in these various acts, should be understood in its widest signification, and that all substances which are classified as a mineral product in trade or commerce, or possess economic value for use in trade, manufacture, the sciences, or the arts, fall within the designation of the term "mineral." That this is true as a general rule, we have no doubt. We are firmly convinced that it should

<sup>1</sup> See, *ante*, § 33.

<sup>4</sup> Tit. III., ch. I., §§ 85-96.

<sup>2</sup> 102 U. S. 167.

<sup>3</sup> See, *ante*, § 96.

<sup>5</sup> *United States v. Mullan*, 7 Saw. 466, 470; S. C. on appeal, 118 U. S. 271.



be accepted as a universal rule in dealing with the public lands. But when we are confronted with the administration of the school land grants, railroad grants, and other grants of a like character, we find the land department disposed to discriminate in some instances between those substances which are obviously mineral and those which, owing to the advancement in science and the industrial arts, become classified commercially or scientifically as mineral products.

§ 138. **Petroleum lands.**—Thus the land department, in a very recent case decided by Secretary Hoke Smith,<sup>1</sup> has held that petroleum is not a mineral within the meaning of the mining acts, and that lands containing it, though in sufficient quantities to render them more valuable for that purpose than for any other, are not mineral lands, and may be selected by the state in lieu of lost sixteenth and thirty-sixth sections.

The same secretary had in a previous instance ruled that petroleum lands could not be appropriated under the mining laws;<sup>2</sup> and, of course, his ruling as to state selections logically followed.

Secretary Smith in his first decision makes the statement that the first mention of petroleum in connection with the mineral laws was in the case of *Maxwell v. Brierly*,<sup>3</sup> wherein Secretary Teller classifies petroleum as a mineral product, not in a case involving petroleum lands, but by way of a general recital as to what substances in his judgment should be classified as mineral.

Mr. Smith evidently overlooked the fact that General Burdett, while commissioner of the general land office (1875), had established a rule, which succeeding administrations followed—that petroleum claims might be entered under the mining act of 1872.<sup>4</sup>

<sup>1</sup> *Chandler v. State of California*, Oct. 27, 1896.

<sup>2</sup> *Ex parte Union Oil Co.*, 23 L. D. 222.

<sup>3</sup> (1883), 10 Copp's L. O. 50.

<sup>4</sup> Copp's Min. Lands, 160.

In 1882, Commissioner McFarland announced that, according to the practice of the department, lands containing petroleum had theretofore been entered as placers and patented as such, and that such lands were subject to entry and disposal according to the law and regulations relating to placer claims.<sup>1</sup> This was also overlooked by Secretary Smith.

The cases of *Downey v. Rogers*,<sup>2</sup> *Samuel E. Rogers v. Roberts v. Jepson*,<sup>3</sup> and *Piru Oil Company*<sup>4</sup> followed, and read in the light of the antecedent practice of the land department, recognize petroleum as a mineral product, and lands containing it in sufficient quantities to make them more valuable for oil purposes than for any other as being mineral lands. Secretary Smith comments on these four cases, and declines to accept them as tending to establish the doctrine for which we are contending.

The secretary cites the Pennsylvania case of *Dunham v. Kirkpatrick*,<sup>5</sup> to the effect that a reservation of "mineral" in a deed does not include petroleum, although it is admitted petroleum is technically a mineral.

This decision is in conflict with prior cases decided in Pennsylvania,<sup>6</sup> and has been practically overruled or its doctrine ignored by the same court in a later case.<sup>7</sup>

The ruling of Secretary Smith as to the mineral character of petroleum is in direct opposition to a decision in the United States circuit court (ninth circuit), wherein Judge Ross, sitting as circuit judge, says:—

"The premises in controversy are oil-bearing lands, the government title to which, under existing laws, *can alone be acquired pursuant to the provisions of the mining laws relating to placer claims*."<sup>8</sup>

<sup>1</sup> *In re* A. A. Dewey, 9 Copp's L. O. 51.

<sup>2</sup> 2 Land Decisions, 707.

<sup>3</sup> 4 Land Decisions, 284.

<sup>4</sup> *Id.* 60.

<sup>5</sup> 16 Land Decisions, 117.

<sup>6</sup> 101 Pa. St. 36.

<sup>7</sup> *Stoughton's Appeal*, 88 Pa. St. 198; *Thompson v. Noble*, 3 Patsb. 401. See, also, 10 Morr. Min. Rep., 421, note 8.

<sup>8</sup> *Gill v. Weston*, 110 Pa. St. 313.

<sup>9</sup> *Gird v. Cal. Oil Co.*, 60 Fed. 531, 532.

We think, considering the previous practice of the land department and its construction of the mining laws as applied to oil lands, as well as the weight of judicial decisions, Secretary Smith was in error in deciding that lands containing petroleum could not be acquired under the mining laws, but were open to selection under grants to the states.

**§ 139. Lands chiefly valuable for building-stone.**—While on the subject of a restricted meaning applied to the term “mineral lands” in administering the school land grants we might note, in passing, that the land department at one time held that lands chiefly valuable for building-stone were not excepted from the grant to the state for school purposes,<sup>1</sup> although under the act of congress of August 4, 1892,<sup>2</sup> such lands might be entered under the placer mining laws, and although by numerous decisions prior to the passage of that act the department held that they were subject to entry under the mining laws.<sup>3</sup>

Whatever may have been the rule as to this class of lands prior to the passage of the act of August 4, 1892, as then applied to the administration of land grants for school purposes, it is quite manifest that under the rule announced by the supreme court of the United States in *Mullan v. United States*, hereafter cited,<sup>4</sup> that act was a legislative interpretation which for all future purposes classified lands containing valuable deposits of building-stone as mineral lands, and they can not now be selected under the school land grants. We think the weight of authority sustains us in the view that they never could be so selected, subsequent to the passage of the placer laws of 1870 at least.

<sup>1</sup> *In re Joseph H. Harper*, 16 L. D. 110; *South Dakota v. Vermont S. Co.*, 16 L. D. 263.

The department in the later case of *Paris Gibson* (21 L. D. 327) declined to give its approval of the doctrine of the *South Dakota* case.

<sup>2</sup> 27 Stats. at Large, 264.

<sup>3</sup> *Bennett's Placer*, 3. L. D. 116; *McGlenn v. Wienbroer*, 15 L. D. 370; *Maxwell v. Brierly*, 10 Copp's L. O. 50.

<sup>4</sup> See, *post*, § 140.

§ 140. In construing the term "mineral lands," as applied to administration of school land grants, the time to which the inquiry is addressed is the date when the asserted right to a particular tract accrued, and not the date upon which the law was passed authorizing the grant.—We have digressed for the moment to discuss a question which might be more appropriately presented when dealing with the character of lands subject to appropriation under the so-called placer laws, but it seems necessary for us here to present the matter as introductory to the main subject presently under consideration.

There is nothing in the context of the school land-grant laws where the reservation of "mineral lands" appears which restricts the meaning of the term. If a restricted meaning is to be applied, it must be by reason of the relative position of the parties or the substance of the transaction.<sup>1</sup>

In considering this "relative situation of the parties, and the substance of the transaction," to what point of time must we direct our attention in dealing with school land grants and rights asserted under them? To the date of the passage of the act making the grant or authorizing the selection, or the time when the state or its grantees become first entitled to assert a claim to a particular tract of land?

Fortunately, this question has been satisfactorily settled for us; so that lengthy discussion will be avoided.

Prior to the passage of the coal land act of July 1, 1864,<sup>2</sup> the land department did not regard or treat coal lands or coal mines as mineral lands, within the meaning of the prior acts of congress.<sup>3</sup> This act provided:—

"That when any tracts embracing coal-beds or coal-fields constituting portions of the public domain, and which, as mines, are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary entry, it shall and may be lawful for the president to cause such tracts in suitable legal subdivisions to be offered at public sale to the highest bidder."

<sup>1</sup> Stewart on Mines, 10-13. See, *ante*, § 11.

<sup>2</sup> 13 Stats. at Large, 343.

<sup>3</sup> *In re Youkum*, 1 Copp's L. O. 3.

Assuming that the above ruling of the land department was correct, prior to the passage of that act coal lands might be selected under previously enacted school land-grant laws.

In 1868, one Mullan applied to the state surveyor-general of California to purchase a half-section of land selected by the state under the act of March 3, 1853, in lieu of the corresponding half of a sixteenth section theretofore lost to the state. His application was favorably considered, and in due process of time the secretary of the interior listed the land to the state, and Mullan or his grantee received a state patent. At the time Mullan instituted the proceedings culminating in the listing and issuance of the state patent the land was notoriously coal land, and was being actually worked for its coal deposits by the Black Diamond coal company. These facts were brought to the attention of the government, and suit was instituted in its behalf to vacate the listing. The case was tried before the late Judge Sawyer, in the circuit court of the United States (ninth circuit),<sup>1</sup> who held that whatever might have been originally the proper construction of the word "mines," as used in the pre-emption act of 1841, the act of July 1, 1864, gave a legislative construction to the term which thenceforth attached to all known "coal-beds or coal-fields" *in which no interest had before become vested*, and withdrew such coal lands from the operation of all other acts of congress; that thereafter known coal lands were not subject to selection by the state as lieu lands; and that the state has no indefeasible rights to select such lieu lands from any particular class of lands.

The supreme court of the United States affirmed this decision,<sup>2</sup> thus summing up its views:—

"At the time the selection was actually made therefor, "it cannot be doubted that the land was mineral land, both "in law and in fact, within the meaning of the act under "which the state, and those who purchased from the state,

<sup>1</sup> United States v. Mullan, 7 Saw. 466.

<sup>2</sup> Mullan v. United States, 118 U. S. 271.

"undertook to acquire title, and we agree with the circuit court in the opinion that the *rights of the parties are to be determined by the law as it stood then.*"

The enactment of the general mining laws by congress incorporated into the land system a new element, announced new principles and a new policy, in the light of which all pre-existing land-grant laws to the extent that they remain unsatisfied are to be administered. All land-grant acts passed subsequent to the enactment of the mining laws operative in any of the precious-metal-bearing states or territories, contain the usual clauses of reservation as to mineral lands.

§ 141. **Test of mineral character applied to school land grants.**—As conclusions logically flowing from what has been heretofore said, the question as to whether a given tract of land is mineral, and its selection under school land-grant laws for that reason inhibited, or is non-mineral, and subject to selection, is one to be determined according to the state of the law as it exists at the time the right to select is asserted.

If the mineral character of such tract is established according to the rules announced in section ninety-eight, then it cannot pass under the grants to states for educational or other purposes.

It is, of course, conceded that after a right has once vested to a tract of land which, at the time it became segregated from the body of the public domain and passed to states or individuals, was non-mineral, according to the state of the law and the facts then existing, no subsequent change in commercial conditions nor advancement in the industrial arts can effect those rights.<sup>1</sup> But tracts still open to selection are, in turn, to be governed by the new condition of things, and controlled by such enlarged definitions as may be then applied by the current of judicial authority. This rule injures no one. It is consistent with the progressiveness of the age and the spirit of our laws.

<sup>1</sup> *In re Paris Gibson*, 21 L. D. 327.

§ 142. **When grants to the sixteenth and thirty-sixth sections take effect.**—Until the survey of the township and the designation of the specific sections, the right of the state rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be the subject of the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach; and if there is no legal impediment, the title of the state becomes a legal title.<sup>1</sup>

While the grant of these sections is one *in præsenti*, it is, before the lands are surveyed, essentially a float, a grant of a quantity of lands equal in amount to twelve hundred and eighty acres in each township.

Until the status of the lands is fixed by a survey, and they are capable of identification, congress reserves absolute power over them, compensating the state for such loss as might accrue to it to the extent that legal impediments prevent the title from passing.<sup>2</sup>

Until the survey is finally approved, the state has no title which it can convey to a purchaser.<sup>3</sup>

Therefore, in determining whether or not the lands embraced within these sections are mineral lands, and exempted from the operation of the grant, the inquiry is addressed to their known character at the time of the final approval of the survey. If at the time of such approval they are known to be mineral, within the meaning of that term as heretofore defined, title does not pass to the state,<sup>4</sup>

<sup>1</sup> *Cooper v. Roberts*, 18 How. 173. See, also, *Sherman v. Buick*, 45 Cal. 656; *Higgins v. Houghton*, 25 Cal. 252; *Finney v. Berger*, 50 Cal. 248; *Medley v. Robertson*, 55 Cal. 397, 399.

<sup>2</sup> *Heydenfeldt v. Daney G. M. Co.*, 93 U. S. 634.

Under act of February 28, 1891 (26 Stats. at Large, 796), states are awarded indemnity by reason of losses accruing to them on account of mineral character of sixteenth and thirty-sixth sections.

<sup>3</sup> *Finney v. Berger*, 50 Cal. 248; *Medley v. Robertson*, 55 Cal. 397.

<sup>4</sup> *Ivanhoe M. Co. v. Keystone Cons. M. Co.*, 102 U. S. 167; *Heydenfeldt v. Daney*, 93 U. S. 634; *Hermocilla v. Hubbell*, 89 Cal. 5.



but remains in the general government and subject to its disposal under the mining laws<sup>1</sup>

If they were not known to be mineral at the date of the approval of the survey, they pass to the state, and discovery of minerals on such lands subsequent to such approval does not defeat the title of the state.<sup>2</sup>

As was said by the supreme court of the United States,<sup>3</sup> a change in the conditions occurring subsequently to the taking effect of the grant, whereby new discoveries are made, or by means whereof it may become profitable to work the mineral deposits, cannot affect the title as it passed at the time of the grant. This is a general rule, applicable to all classes of grants.<sup>4</sup>

It is also true that if at the time the grant would have taken effect, in the absence of legal impediments, the land was known to be mineral in character, the subsequent exhaustion of the mineral and its abandonment for mining purposes would not operate to vest title in the state.<sup>5</sup>

What we have heretofore said as to the time when grants to sixteenth and thirty-sixth sections take effect, applies to surveys made subsequent to the admission of the state into the union. Where lands have been surveyed prior to the admission of the state, the grant takes effect as of the date of admission, and in such cases the inquiry as to the character of the land is directed to that point of time.<sup>6</sup>

<sup>1</sup> *Hermocilla v. Hubbell*, 80 Cal. 5.

<sup>2</sup> *Wheeler v. Smith*, 32 Pac. 784; *Townsite of Silver Cliff*, 6 Copp's L. O. 152; *Keystone Case*, Copp's Min. Dec. 105, 109, 125; *State of California v. Foley*, 4 Copp's L. O. 18; *In re J. Darit*, 5 Copp's L. O. 178; *In re State of Colorado*, 6 L. D. 412; *Virginia Lode*, 7 L. D. 459; *In re Abraham L. Miner*, 9 L. D. 408; *Pereira v. Jacks*, 15 L. D. 273.

<sup>3</sup> *Colo. C. & I. Co. v. United States*, 123 U. S. 307.

<sup>4</sup> *Deffeback v. Hawke*, 115 U. S. 404; *Davis v. Weinhold*, 130 U. S. 507; *Hunt v. Steese*, 75 Cal. 620; *Cowell v. Lammers*, 10 Saw. 247; *Manning v. San Jacinto Tin Co.*, 7 Saw. 419; *Richards v. Dower*, 81 Cal. 51, S. C. on writ of error, 151 U. S. 608; *McCormick v. Sutton*, 97 Cal. 373; *Smith v. Hud*, 89 Cal. 122.

<sup>5</sup> *Hermocilla v. Hubbell*, 80 Cal. 5.

<sup>6</sup> *Townsite of Silver Cliff*, 6 Copp's L. O. 152; *Boulder & Buffalo M. Co.*, 7 L. D. 54; *Fleetwood Lode*, 12 L. D. 604; *Warren v. State of Colorado*, 14 L. D. 681.



**§ 143. Selections by the state in lieu of sixteenth and thirty-sixth sections, and under general grants.**— It follows, as a corollary from what has heretofore been said, that the states can not select lands of known mineral character in satisfaction of any of their land grants.<sup>1</sup>

The point of time when the character of a given tract sought to be selected by the state in satisfaction of any of its floating grants is to be determined, is the time when application to select is made. In making this investigation, the land department is governed by the same rules of law and practice as control the administration of homestead, railroad, and other classes of grants. While the investigation is directed to the time when application to select is made, the land department retains jurisdiction until the selection has been finally approved, and the lands are finally certified or listed to the state, such listing being the equivalent of a patent.<sup>2</sup>

A discovery of mineral at any time prior to this listing, in sufficient quantities to render the land more valuable for mining purposes than for any other, would authorize the department to reject the selection.<sup>3</sup>

Until the selection is finally approved by the officers of the government charged with this duty, and the land is certified or listed to the state, the state has no title which it can convey to the purchaser.<sup>4</sup>

Without such approval, neither the state nor its grantee can question any future disposition which the United States may make of the land embraced in the attempted selection.<sup>5</sup>

**§ 144. Effect of surveyor-general's return as to character of land within sixteenth and thirty-sixth sections,**

<sup>1</sup> *United States v. Mullan*, 7 Saw. 470; *Mullan v. United States*, 118 U. S. 271.

<sup>2</sup> *Howell v. Slauson*, 83 Cal. 539.

<sup>3</sup> This subject will be more generally dealt with when treating of the jurisdiction and functions of the land department, in a subsequent chapter.

<sup>4</sup> *Churchill v. Anderson*, 53 Cal. 212; *Buhne v. Chism*, 48 Cal. 467; *Wisconsin Cent. R. R. v. Price*, 133 U. S. 496.

<sup>5</sup> *Roberts v. Gebhart*, 104 Cal. 67.

or lands sought to be selected in lieu thereof, or under floating grants.—We have already had occasion to comment on the general unreliability of that class of returns of surveyors-general<sup>1</sup> from which an inference or presumption is said to arise that the lands are non-mineral in character. Where the lands, however, are returned as mineral, it suggests direct knowledge brought to the attention of the surveyor of the notorious mineral character of the land. And in such cases, perhaps, more weight should be given to the returns. Be that as it may, where a given sixteenth or thirty-sixth section is returned as mineral by the surveyor, and his field-notes and plat are filed in the general land office, this is a sufficient determination that the lands are mineral to authorize the state to select indemnity lands in lieu thereof.<sup>2</sup>

Of course, the state having selected lieu lands in such a case, it would be estopped from ever after claiming that the surveyor-general's return upon which it based its right to select lieu land was false. A like estoppel rests upon the government. It will not be permitted to assert that the lands are not mineral in character, as it is only by reason of this character that the government retains dominion and control over the lands.

Where, however, no application is made to select land in lieu of sixteenth and thirty-sixth sections, returned as mineral, the state has a right to be heard upon the question of the character of the land, in whatever tribunal the question is raised. If a mining location is made upon such a section, and application is made for a mineral patent, the state is a necessary party to the investigation touching the character of the land and the time when it became known as such.<sup>3</sup>

It cannot be deprived of this right by any proceeding to which it is not a party. In cases of railroad grants, where lands have been applied for by the company, the

<sup>1</sup> See, *ante*, § 106.

<sup>2</sup> *Johnson v. Morris*, 72 Fed. 890; *In re State of California*, 23 L. D. 423.

<sup>3</sup> *Boulder & Buffalo M. Co.*, 7 L. D. 54; *Fleetwood Lode*, 12 L. D. 604.

published notice of application for a mineral patent to the lands applied for has been held to be sufficient notice to *all* claimants, and we do not see why the same rule should not be applicable to school grants.<sup>1</sup> On the other hand, a mineral claimant may attack the right of a state or its vendee to the tract, although returned as agricultural, in the ordinary tribunals, by showing that at the date of the survey or admission of the state, as the case may be, the land was known to be mineral, and did not pass to the state.<sup>2</sup>

As sixteenth and thirty-sixth sections pass to the state in the absence of legal impediment, without certification, by the survey *propria vigore*, or by the admission of the state, there is no preliminary adjudication, actual or presumed, by the land department as to the character of the land, as there is in the administration of floating grants, or even in railroad grants of particular sections. There is no antecedent judgment, as there is in pre-emption or homestead cases, which is final and conclusive upon collateral attack. It follows that the question may be raised at any time by any one in privity with the government of the United States. The holder of a valid subsisting mining location is in such privity.<sup>3</sup>

With reference to the state selecting lieu lands, or lands in satisfaction of its floating grants, it is not precluded from applying for lands returned as mineral. It has a right to contest this return, and establish upon hearings ordered for that purpose the non-mineral character of the land, the same as any other applicant to purchase or make private entry of public lands.

But before such selection can be preliminarily accepted, the state must "prove the mineral off," upon notice given of a hearing for that purpose.<sup>4</sup>

<sup>1</sup> N. P. R. R. v. Cannon, 54 Fed. 252.

<sup>2</sup> Hermocilla v. Hubbell, 89 Cal. 5.

<sup>3</sup> *Id.*

<sup>4</sup> Am. rule 110, regulations of the department, 19 L. D. 5; State of California, 22 L. D. 294; *Id.*, on review, 22 L. D. 402; Com'rs' Letter, Copp's Min. Dec. 40.

§ 145. **Conclusions.** — From the foregoing exposition of the law, we deduce the following conclusions: —

(1) That lands embraced within sixteenth or thirty-sixth sections, known to be mineral in character at the date of the final approval of the survey, where such approval becomes effectual subsequent to the admission of the state, do not pass to the state, but remain a part of the public mineral domain, subject to exploration and purchase, the same as other public mineral lands. Where the surveys have been approved prior to the admission of the state, and at the date of such admission the lands are known to be mineral, a like result follows. The lands do not pass to the state, but remain subject to disposal by the government under the mining laws.

(2) The state may not select as lieu lands, or lands in satisfaction of its floating grants, any tract whose mineral character is known or established prior to the final approval of the selection and listing to the state.

(3) Where sixteenth and thirty-sixth sections are returned by the surveyor as mineral, and the state accepts this return and selects other lands in lieu thereof, both the state and general government are estopped from thereafter asserting that the lands are non-mineral.

(4) Where such sections are returned as mineral, and the state does not accept the return as establishing the character of the land, it has a right to its "day in court" for the purpose of impeaching the return. Where it desires to select lands, either in lieu of sixteenth and thirty-sixth sections or under its floating grants, which lands are returned by the surveyor-general as mineral, it has a right to "prove the mineral off," and, if successful, to have such lands listed to it.

(5) Whether or not a given tract is of a known mineral character at the time the grant or selection would take effect, in the absence of legal impediments, must be determined by the facts as they exist at that time, and the then state of the law, as recognized by the current of judicial authority.

## ARTICLE IV. RAILROAD GRANTS.

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| <p>§ 149. Area of grants in aid of railroads, and congressional legislation donating lands for such purposes.</p> <p>§ 150. Types of land grants in aid of the construction of railroads, selected for the purpose of discussion.</p> <p>§ 151. Character of the grants.</p> <p>§ 152. Reservation of mineral lands from the operation of railroad grants.</p> <p>§ 153. Grants of rights of way.</p> <p>§ 154. Grants of particular sections as construed by the courts.</p> <p>§ 155. Construction of railroad grants by the land department.</p> | <p>§ 156. Distinctions between grants of sixteenth and thirty-sixth sections to states and grants of particular sections to railroads.</p> <p>§ 157. Indemnity lands.</p> <p>§ 158. Restrictions upon the definition of "mineral lands," when considered with reference to railroad grants.</p> <p>§ 159. Test of mineral character of land applied to railroad grants.</p> <p>§ 160. Classification of railroad lands under special laws in Idaho and Montana.</p> <p>§ 161. Effect of patents issued to railroad companies.</p> <p>§ 162. Conclusions.</p> |
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**§ 149. Area of grants in aid of railroads, and congressional legislation donating lands for such purposes.**—From the year 1850 to June 30, 1880, congress granted to states, territories, and railroad corporations, in aid of the construction of railways, upwards of one hundred and fifty million acres of the public domain. Of these, more than one hundred million acres were within the precious-metal-bearing states and territories.<sup>1</sup>

Prior to 1862, grants of this character were generally made to states as trustees and agents of transfer for the benefit of companies projecting the railways; but with the passage of the Pacific railroad act, July 1, 1862,<sup>2</sup> was inaugurated a complete change in the system of land bounties to aid in the construction of railroads. The grants were thenceforward direct to the corporation.<sup>3</sup> As to grants made prior to 1862, we have no particular concern. Most, if not all, of the roads extending into the mineral regions

<sup>1</sup> Public Domain, 273-287.<sup>3</sup> Public Domain, 267.<sup>2</sup> 12 Stats. at Large, 489.

of the west received their donations either under the Pacific railroad acts of 1862 and 1864 or under acts subsequently passed.

It is not within the purview of this treatise to deal with railroad grants in any respect, other than as the operation of such grants within the precious-metal-bearing states and territories requires us to analyze the general character of the grants, and to determine the nature and extent of the things granted, the time when such grants take effect as to particular tracts, and such collateral questions as may be incidentally necessary to elucidate or explain the reasons for the rules established by the courts and the land department in administering the various grants.

For this purpose it will not be necessary to enumerate or discuss all the acts of congress granting lands in aid of the construction of railroads, but it will be sufficient for us to take as a basis certain pronounced types. So far as the scope of this treatise is concerned, these types represent features common to all grants. While there may be limitations in some of the later acts which do not appear in the selected types, and perhaps larger privileges and immunities are conferred by some than by others, yet in so far as the administration of the grants within the mineral regions and their application and effect with reference to mineral lands is concerned, we do not understand that there is any opportunity for differentiation.

§ 150. **Types of land grants in aid of the construction of railroads, selected for the purpose of discussion.**—We select for the purpose of discussion the following acts and resolutions of congress:—

(1) An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes (approved July 1, 1862),<sup>1</sup> and the act amendatory thereof (approved July 2, 1864).<sup>2</sup>

<sup>1</sup> 12 Stats. at Large, 489.

<sup>2</sup> 13 Stats. at Large, 356.

(2) An act granting lands in aid of the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route (approved July 2, 1864).<sup>1</sup>

(3) Joint resolution reserving mineral lands from the operation of all acts passed at the first session of the thirty-eighth congress granting lands or extending the time of former grants.<sup>2</sup>

A consideration of the grants provided for by these acts, taken in connection with the joint resolution of congress, will enable us to present the subject under discussion fairly, to note the adjudicated cases, and from them formulate what we understand to be the rules to be applied in construing and administering grants of this character according to the existing state of the law.

§ 151. **Character of the grants.**—The act of July 1, 1862, granted to the corporations therein named, commonly called the "Pacific railroad companies," rights of way over the public lands to the extent of two hundred feet in width on each side of the road, together with all necessary grounds for stations, buildings, workshops, and depots, machine-shops, turn-tables, switches, side-tracks, and water-stations. In addition, there was also granted every alternate section of public land not sold, reserved, or otherwise disposed of, designated by odd numbers, to the amount of five alternate sections per mile on each side of the respective roads, on the line thereof, and within the limits of ten miles on each side of said roads.

The amendatory act of July 2, 1864, enlarged this grant from five to ten alternate sections, and the lateral limits from ten to twenty miles. Neither of these acts contained any provision authorizing the selection of indemnity lands in lieu of odd-numbered sections, which might be subsequently ascertained to be lost to the companies by reason of their prior sale, reservation, or other disposition.

<sup>1</sup> 13 Stats. at Large, 365.

<sup>2</sup> *Id.* 567.



The act of July 2, 1864, incorporating the Northern Pacific railroad company, made a like grant to that company of rights of way and lands for necessary depot and other purposes. In the territories through which the projected roads might pass a land grant was given of every alternate odd-numbered section to the amount of twenty alternate sections per mile, and in the states ten alternate sections per mile.

There was also granted indemnity lands for odd-numbered sections which might be ascertained to be lost to the company, by reason either of their mineral character or their prior sale, reservation, or disposal, such indemnity lands to be selected within certain limits specified in the act.

We therefore have to deal with practically three classes of grants:—

(1) Grants of rights of way and lands for depots, sidetracks, and kindred purposes;

(2) Grants of particular sections within certain defined limits, generally called "primary," or "place," limits;

(3) A right to select lands in lieu of and as indemnity for losses accruing to the respective companies by reason of the odd-numbered sections having been previously sold, reserved, or otherwise disposed of, this right of selection to be exercised within certain defined limits, generally called "indemnity limits."

We will presently consider these different classes of grants and their attributes.

**§ 152. Reservation of mineral lands from the operation of railroad grants.**—At the time the Pacific railroad land-grant acts were passed there was no congressional law authorizing the acquisition of title to mineral lands. They were passed during what we have denominated, in a previous chapter,<sup>1</sup> as the second period of our national history,

<sup>1</sup> Tit. II., ch. iii., §§ 40-49.



during which rights and privileges upon the public mineral lands were regulated by local rules and customs, with the passive acquiescence of the government. As was said by the circuit court of appeals (ninth circuit), in dealing with mining locations within the limits of railroad grants, claims to mineral lands could be lawfully initiated by discovery, possession, and development, according to the customs of miners and local regulations at and previous to the date of the railroad grant (1864).<sup>1</sup>

When these railroad acts became laws, the policy of the government of reserving the mines and mineral lands for the use of the United States was fixed; and if there had been no special clauses of reservation in the acts, the courts would have been forced to the conclusion that such lands were reserved by implication from the donations to railroads, following the doctrine announced with reference to grants of sixteenth and thirty-sixth sections to the states for school purposes.<sup>2</sup>

However, in framing the railroad acts, congress deemed it prudent to leave no room for dispute or discussion on this score, and inserted in each one of the acts clauses of reservation. The act of July 1, 1862,<sup>3</sup> contained the proviso "that all mineral lands shall be excepted from the operation of this act." The amendatory act of July 2, 1864, provided that "any lands granted by this act or the act to which this is an amendment . . . shall not include . . . mineral lands, . . . or any lands returned and denominated as mineral lands." It also provided "that the term 'mineral land,' wherever the same occurs in this act and the act to which this is an amendment, shall not be construed to include coal and iron land." The act of July 2, 1864, incorporating the Northern Pacific railroad company, contained reservations and limitations of similar import.<sup>4</sup>

<sup>1</sup> N. P. R. R. v. Sanders, 49 Fed. 129, 134.

<sup>2</sup> Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167. See, *ante*, § 136.

<sup>3</sup> 12 Stats. at Large, p. 492, § 3.

<sup>4</sup> 13 Stats. at Large, p. 367, § 3.

At the second session of the same congress (thirty-eighth) which passed the act amendatory of the original Pacific railroad act and the Northern Pacific act, a joint resolution was adopted by the senate and house of representatives which provided,—

“That no act passed at the first session of the thirty-eighth congress granting lands to states or corporations to aid in the construction of roads or for other purposes . . . shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act making the grant.”

The mining act of July 26, 1866, followed.

The circuit court of appeals for the ninth circuit has held that these reservations in railroad grants were made in contemplation of future legislation as well as the existing laws.

In the light of this legislation, it is difficult to understand how any serious controversy could arise over the administration of these land grants in the mineral regions. But such conflicts did arise, generally between purchasers of the railroad title and mineral claimants, and the battle was fiercely waged in all the tribunals, both state and federal. These controversies involved a discussion as to the character of the grants and the time when they took effect as to particular tracts. We have observed that there are found in this class of legislation grants of three different kinds: (1) the grant of the right of way and for side-tracks, stations, and kindred purposes; (2) grants of particular sections; (3) indemnity lands. We will consider each class with reference to the mineral reservations found in the several acts

**§ 153. Grants of rights of way.**—The grants of rights of way found in the various railroad acts contain no reservations or exceptions. They are present, absolute grants, subject to no conditions, except those necessarily implied,

<sup>1</sup> 13 Stats. at Large, 567.    <sup>2</sup> N. P. R. R. v. Sanders, 49 Fed. 129.

such as that the road shall be constructed and used for the purposes designated. All persons acquiring any portion of the public lands, after the passage of such acts, take the same subject to the right of way conferred by them for the proposed road.<sup>1</sup>

The grants are floats until the line of the road is "definitely fixed" by filing the map of definite location. When so filed, and approved by the secretary of the interior, title vests to the lands within the limits of the right of way, as fixed by the act, as of the date of the passage of the act.<sup>2</sup>

The reservation of "mineral lands," found in these acts, does not apply to the lands embraced within the right of way limits. This right of way extends to and covers all public lands, whether mineral or not.<sup>3</sup>

If, at the time the right of way attaches, mineral lands over which the road is to pass are unoccupied, a subsequent location thereof, followed by a patent to the locators, is inferior to the right of way to the company, and must yield to the superior legal title, without resort to a court of equity to set the patent aside.

As was said by the supreme court of Montana,—

"The mineral lands excluded from the operation of this  
"act are evidently not those covered by the right of way.  
" . . . And it would be destructive of the rights of the  
"railroad company if mining claims could at any time be  
"located and worked upon the track and land covered by  
"the right of way. . . . The operations of mining and  
"the business of railroads cannot be conducted at the same  
"time upon the same ground; and a reservation of such a  
"character would beget a conflict of rights and a confusion

<sup>1</sup>St. Joseph and Denver City R. R. Co. v. Baldwin, 103 U. S. 426.

It is probable that the government would be considered as the proprietor of the minerals underneath the surface dedicated to the right of way, and that this grant did not pass the fee. But as under the mining laws all locations involve delineation of surface limits, and there is no law authorizing a specific grant of the minerals underlying the right of way, the estate of the railroad company is practically absolute.

<sup>2</sup>St. Joseph and Denver City R. R. Co. v. Baldwin, 103 U. S. 426; Smith v. N. P. R. R., 58 Fed. 513; W. P. R. R. v. Tevis, 41 Cal. 489.

<sup>3</sup>Doran v. C. P. R. R., 24 Cal. 246; Wilkinson v. N. P. R. R., 5 Mont. 538, 548.

"of interests not in contemplation of intelligent legislative action."<sup>1</sup>

The limits of the grant of the right of way once fixed by the filing and approval of the map of definite location cannot thereafter be changed to the detriment of any other party.<sup>2</sup>

It will be remembered that these decisions are under acts passed prior to the mining act of July 26, 1866. We do not concede that a right of way granted to a railroad company subsequent to the passage of that act would take precedence over a prior valid subsisting mining location. As we understand the law, since the passage of the mining acts the location of a valid mining claim operates to withdraw the land embraced within it from the public domain. It is a grant from the government. A railroad corporation claiming a right of way under a subsequent grant by congress could not cross the located mining claim without condemning the land and paying the miner compensation. In this respect, as we will hereafter endeavor to show, mining claims differ from inchoate homestead and pre-emption claims. As to lands for depot, side-track, and other kindred purposes, no controversies are likely to arise. For the most part, these adjuncts are necessarily within the right of way limits, if in fact the laws do not contemplate they should be. If other lands necessary to be used for these collateral purposes may be selected outside of the right of way limits, then their selection would necessarily be under the supervision of the land department, and rights thereto would not attach until final approval of the selection.

§ 154. Grants of particular sections, as construed by the courts.—The grants of the alternate sections are said to be of lands "in place," and the limits within which they are granted are called, "primary," or "place," limits, contradistinguished from "indemnity" limits, in cases of

<sup>1</sup> *Wilkinson v. N. P. R. R.*, 5 Mont. 538, 548.

<sup>2</sup> *Smith v. N. P. R. R.*, 58 Fed. 513, and cases cited.

grants which provide for indemnity or lieu selections, as well as for lands "in place."

Grants of particular sections or of lands "in place" do not acquire precision until the lands are surveyed and the line of the road is definitely fixed. Until such time the grant is said to be a float. Such grants are, however, grants *in præsenti*. They attach to particular tracts as soon after the filing of the map of definite location of the road as these tracts become identified by survey; and when so identified, title vests in the company, in the absence of legal impediments, by relation as of the date of the passage of the act. This is too well settled to require argument. The authorities in support of it are numerous and uniform.<sup>1</sup>

While this is true as to such lands as are within the purview of the grant, it is not to be inferred that the mineral or non-mineral character of the land is to be determined as of the date of either the survey or filing the map of definite location.

This question came before the circuit court of the United States for the ninth circuit, northern district of California, upon the demurrer to the complaint in the case of *Francœur v. Newhouse*,<sup>2</sup> wherein the late Judge Sawyer announced the rule that the exception of mineral lands from the grant to the Pacific railroads only extended to lands *known* to be mineral and apparently mineral at the time *when the grant attached*; and a discovery of a gold mine in the lands after the title has vested in the company by full performance of the conditions did not defeat the title of the railroad company, although at the time of the discovery no patent had been issued to the railroad.

<sup>1</sup> *Van Wyck v. Knevals*, 106 U. S. 360; *Kan. P. Ry. Co. v. Dunmeyer*, 113 U. S. 629; *St. Paul & Pacific R. R. Co. v. N. P. R. R. Co.*, 139 U. S. 1-5; *Sioux City & I. F. T. L. & L. Co. v. Griffey*, 143 U. S. 32; *Smith v. N. P. R. R.*, 58 Fed. 513; *United States v. S. P. R. R.*, 146 U. S. 570; *Schulenberg v. Harriman*, 21 Wall, 44, 60; *Missouri, K. & T. R. Co. v. Kansas Pac. R. R. Co.*, 97 U. S. 491; *St. Joseph & Denver C. R. Co. v. Baldwin*, 103 U. S. 426; *N. P. R. R. v. Wright*, 54 Fed. 67; *S. P. R. R. v. Whitaker*, 109 Cal. 268; *McLaughlin v. Menotti*, 89 Cal. 354.

<sup>2</sup> 40 Fed. 618.

Subsequently, at the trial of this cause, the same judge charged the jury to the same effect; that the words "mineral land," as used in the act of congress, meant land known to be mineral at the time the grant took effect and attached to the specific land in question, or lands which there was satisfactory reason to believe were such at said time; that only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral, at the time the grant attached to the land is excepted from the grant.<sup>1</sup> The doctrine thus announced was maintained or accepted in several later cases in the same circuit.<sup>2</sup>

The case of *Northern Pacific Railroad v. Barden*,<sup>3</sup> arose in the same circuit in the district of Montana, the hearing being had before Judges Sawyer and Knowles. Judge Sawyer reiterated his views as expressed in the *Francœur-Newhouse* case; but Judge Knowles dissented, holding that the mineral character of the land might be established at any time prior to the issuance of the patent to the railroad company, and when so established such land was not within the purview of the grant, and the title thereto never vested in the company.

This case went to the supreme court of the United States on writ of error,<sup>4</sup> and that tribunal settled the controversy. The grant there under consideration was to the Northern Pacific railroad, under the act of July 2, 1864, heretofore referred to. It appeared that the line of the road opposite and past the lands in controversy became definitely fixed on July 6, 1882, by filing with the commissioner of the general land office the required plat. The quartz-mining claims were on an odd-numbered section of the railroad grant, within the "place," or "primary," limits, and were discovered in 1888. Prior to such discovery, the railroad company had applied to the government to have the section in question certified to it under its grant, and such

<sup>1</sup> *Francœur v. Newhouse*, 43 Fed. 236.

<sup>2</sup> *Valentine v. Valentine*, 47 Fed. 597; *N. P. R. R. v. Barden*, 46 Fed. 592; *N. P. R. R. v. Sanders*, 49 Fed. 129; *N. P. R. R. v. Cannon*, 54 Fed. 252.

<sup>3</sup> 46 Fed. 592.

<sup>4</sup> *Barden v. N. P. R. R.*, 154 U. S. 288.

application had been approved by the commissioner of the general land office; but no action had been taken thereon by the secretary of the interior. The land in question had been returned by the surveyor-general as agricultural land.

Upon this state of facts the supreme court of the United States enunciated the following rules of law:—

(1) The Northern Pacific railroad company cannot recover under the grant to it by the act of congress of July 2, 1864, mineral lands from persons in possession thereof who have made locations, although the mineral character of the land was not discovered until the year 1888, no patent having been issued to said company therefor;

(2) It was the intention of congress to exclude from the grant of lands to the Northern Pacific railroad company actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral;

(3) The reservation in the grant of mineral lands was intended to keep them under government control for the public good, in the development of the mineral resources of the country, and for the benefit and protection of the miner and explorer, instead of compelling him to litigate or capitulate with a stupendous corporation and ultimately succumb to such terms, subject to such conditions, and amendable to such servitudes as it might see proper to impose;

(4) The government has exhibited its beneficence in reference to its mineral lands, as it has in the disposition of its agricultural lands, where the claims and rights of the settlers are fully protected. The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time.

This is the law of the land; and in the light of these rules all grants to railroads are to be construed and administered. A discovery of mineral on lands falling within the primary, or place, limits of any railroad grant, at any



time prior to the issuance of the patent, if it be demonstrated that such lands are in fact mineral, within the meaning of that term as defined by the current of judicial authority, establishes the fact that the lands are not within the grant, and title thereto never vested in the railroad company.

It will be observed that the grant in question in the *Barden* case was one which in addition to the grant of alternate sections also granted indemnity to the Northern Pacific railroad, in lieu of such lands as might be lost to it by reason of their mineral character. In the decision of the court this fact is noted. But we do not apprehend that this element was of controlling force. The same principles of law as applied to grants which contain indemnity provisions apply with equal force to grants which do not contain them, such as the original Pacific railroad act of July 1, 1862. In the former class of grants, congress has simply declared that the grant as to quantity should not suffer diminution. In the latter, congress has simply granted the lands to the railroad company to the extent that they are of the class which are properly patentable under the act. To the extent that the lands within the limits are within the reservation clauses, then, and to that extent, the grant as to quantity is diminished.

§ 155. **Construction of railroad grants by the land department.**—The rule announced by the supreme court of the United States in the *Barden* case was always followed by the land department in administering railroad grants. This fact is so stated in the decision in that case, and the ruling announced by Secretary Noble in *C. P. R. R. v. Valentine*<sup>1</sup> is thus quoted at length:—

“The very fact, if it be true, that the office of the patent  
“is to define and identify the land granted, and to evince  
“the title which vested by the act, necessarily implies that  
“there exists jurisdiction in some tribunal to ascertain  
“and determine what lands were subject to the grant and

<sup>1</sup>11 Land Decisions, 238, 246.

“capable of passing thereunder. Now, this jurisdiction is  
“in the land department, and it continues, as we have seen,  
“until the lands have been either patented or certified to  
“or for the use of the railroad company. By reason of  
“this jurisdiction, it has been the practice of that depart-  
“ment for many years past to refuse to issue patents to  
“railroad companies for lands found to be mineral in char-  
“acter at any time before the date of the patent. Moreover,  
“I am informed by the officers in charge of the mineral  
“division of the land department that ever since the year  
“1867 (the date when that division was organized) it has  
“been the uniform practice to allow and maintain mineral  
“locations within the geographical limits of railroad grants,  
“based upon discoveries made at any time before patent, or  
“certification where patent is not required. This practice  
“having been uniformly followed and generally accepted  
“for so long a time, there should be, in my judgment, the  
“clearest evidence of error, as well as the strongest reasons  
“of policy and justice, controlling before a departure from  
“it should be sanctioned. It has, in effect, become a rule  
“of property.”<sup>1</sup>

§ 156. **Distinctions between grants of sixteenth and thirty-sixth sections to states and grants of particular sections to railroads.**—Grants to railroads of particular sections bear a striking resemblance to the grants to the states of sixteenth and thirty-sixth sections for school purposes. Both are grants *in præsentia*. But in cases of school grants no patents issue to the state. The state has nothing to do or perform as a condition precedent to the taking effect of the grant. Nor is any action of the land depart-

<sup>1</sup>This case involved the same property in controversy in *Valentine v. Valentine* (47 Fed. 597). The author was counsel for the mineral claimant in both proceedings. Before the land department the inquiry was limited to the *present* character of the land. In the circuit court, under the previous ruling in that circuit in *Franceur v. Newhouse* (40 Fed. 618), the inquiry was addressed to the date of the passage of the railroad act and the filing of the map of definite location. The ruling of the secretary in the case before the land department has been quoted approvingly and followed in later cases. *North Star M. Co. v. C. P. R. R.*, 12 L. D. 608; *N. P. R. R.*, 13 L. D. 691; *Winscott v. N. P. R. R.*, 17 L. D. 274; *N. P. R. R. v. Marshall*, *Id.* 545; *N. P. R. R. v. Champion Cons.*, 14 L. D. 699. See, also, the earlier cases of *C. P. R. R. v. Mammoth Blue Gravel*, 1 Copp's L. O. 134; *G. D. Smith*, 13 Copp's L. O. 28.

ment invoked preliminarily as to determination of the character of the land. It has the power, when called upon at the instigation of either party, to make the investigation; but it is not an exclusive power, and nothing in ordinary cases ever issues to the state which is evidence of any judgment of the land department upon the question of the character of the land. In cases of railroad grants the company is required to comply with a number of conditions before it can assert its right to a patent. The land department retains exclusive jurisdiction over these railroad lands until patent issues, for the purpose of determining whether or not the conditions have been complied with, and necessarily to adjudicate upon the patentability of the lands under the particular act in question. The late Judge Sawyer thus forcibly stated the rule:—

“Under the statute [Pacific railroad act] it is as clearly the duty of the officers authorized to issue patents to the railroad companies, to ascertain whether the lands patented are embraced in the congressional grant, and patentable, or are mineral lands, and not patentable, as it is in the case of pre-emption, homestead, or other entry and sale of public lands to ascertain the facts authorizing the issue of the patent. . . . There must be some point of time when the character of the land must be finally determined; and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent.”<sup>1</sup>

The supreme court of the United States thus announced the rule in the *Barden-N. P. R. R. case*,<sup>2</sup> heretofore discussed, after quoting the ruling of the land department in the case of *C. P. R. R. v. Valentine*.

“The fact remains that under the law the duty of determining the character of the lands granted by congress and stating it in instruments transferring the title of the government to the grantees reposes in officers of the land department. Until such patent is issued, defining the character of the land granted and showing that it is non-

<sup>1</sup> *Cowell v. Lammers*, 10 Saw. 255, 257. See, also, *N. P. R. R. v. Cannon*, 54 Fed. 252.

<sup>2</sup> 154 U. S. 330.

“ mineral, it will not comply with the act of congress in which the grant before us was made.

“ The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form upon a judgment rendered after a due examination of the subject by the officers of the land department charged with its preparation and issue that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary.”

As in cases of sixteenth or thirty-sixth sections there is no “ instrument transferring the title issued by the department, no patent in proper form upon a judgment rendered after a due examination of the subject by the officers of the land department,” the question remains to be litigated whenever and wherever it may arise.

As we have heretofore seen, when dealing with school grants, the surveyor-general’s return concludes no one.<sup>1</sup> Neither does it, for that matter, in the case of railroad grants.<sup>2</sup>

The foregoing illustrates the distinctions to be made between the two classes of grants. We think it nothing more than right that where a given tract of land has been applied for by a railroad company, and its selection thereof is of record, that the company should be notified in some way of an adverse application.<sup>3</sup> The published notice of application for a mineral patent required by section twenty-three hundred and twenty-five has been held to be sufficient.<sup>4</sup>

§ 157. **Indemnity lands.**—Ordinarily, it will not appear at the time the line of the road is definitely fixed how many acres of land or what lands are excepted from the grant of land “ in place,” by reason of their mineral character, prior sales, or reservations. Until this is ascertained

<sup>1</sup> See, *ante*, § 141.

<sup>2</sup> *Barden v. N. P. R. R.*, 154 U. S. 288; *Winscott v. N. P. R. R.*, 17 L. D. 274; *Cal. & Ore. R. R.*, 16 L. D. 262. See, also, *ante*, § 106.

<sup>3</sup> *S. P. R. R. v. Griffin*, 20 L. D. 485.

<sup>4</sup> *N. P. R. R. v. Cannon*, 54 Fed. 252.

the grant is a float, extending over the indemnity limits defined by the act. When any deficiency of the lands in place is determined, the right to select lands in lieu thereof arises, and selection may then be made from any of the lands of the United States within the indemnity limits of the grant; and when such selection is made and approved, the grant for the first time attaches to any specific lands within those limits.<sup>1</sup>

The rules applicable to selection by the states of lands in lieu of sixteenth and thirty-sixth sections are alike applicable to the selection of indemnity lands under acts of congress granting aid to railroads. These rules will be found stated in a preceding section.<sup>2</sup>

As mineral lands cannot inure to the railroad companies within the primary, or place, limits of their respective grants, it follows, as a matter of course, that mineral lands within the indemnity limits cannot be selected in lieu of lands lost to the companies within the place limits.<sup>3</sup>

Until the selection is finally approved and certified to the railroad company, the land department retains jurisdiction for the purpose of investigating the character of the land. If it is found to be mineral, it remains a part of the public domain, and subject to exploration and purchase under the mining laws.

**§ 158. Restrictions upon the definition of "mineral lands," when considered with reference to railroad grants.**—In most of the acts granting lands in aid of the construction of railroads, it is expressly stated that coal and iron are not to be classified as mineral within the meaning of that term, as employed in the reservation

<sup>1</sup>United States v. Winona & St. P. R. R., 67 Fed. 948, 967; Kansas Pac. R. R. v. Atchison, T. & S. F. R. R., 112 U. S. 414, Barney v. R. R. Co., 117 U. S. 228; Sioux City & St. P. R. R. v. Chicago, M. & St. P. R. R., 117 U. S. 406; Wis. Cent. R. R. v. Price Co., 133 U. S. 496; United States v. Missouri, K. & T. R. R., 141 U. S. 358.

<sup>2</sup>See, *ante*, § 143.

<sup>3</sup>United States v. Mullan, 7 Saw. 470; Mullan v. United States, 118 U. S. 271; S. P. R. R. v. Allen G. M. Co., 14 L. D. 165.

clauses. Where such legislative declaration is found, of course, lands containing coal and iron will pass to the railroad company under the grants of particular sections;<sup>1</sup> and where the right of indemnity selection is given, lands containing coal and iron within the indemnity limits may be selected by the railroad company with the same effect as if they were agricultural in character. It follows, as a matter of course, that if the granting act is silent upon the subject of these two commodities, lands containing them do not pass, nor can they be selected as indemnity lands.

In the administration of the railroad grants we encounter the same disposition upon the part of the land department to restrict the meaning of the term "mineral," as used in the reservation clauses of these grants, as we find in dealing with grants to states. What we have heretofore said with reference to this rule of construction when considering the latter class of grants applies with equal force to railroad grants.<sup>2</sup>

In our opinion, the department of the interior, in establishing this doctrine of limited interpretation as applied to land grants, has mistaken the law, and, if persisted in, will lead to harmful results.

Let us review the action of the land department in dealing with this subject as applied to railroad grants.

As early as 1875 the department held that lands more valuable for the deposits of limestone than for agriculture might be patented under the mining laws. This ruling has been followed in later cases.<sup>3</sup>

In the case of *Elias Jacob*,<sup>4</sup> Commissioner Williamson made a contrary ruling; but this decision was overruled by the secretary in the *Hooper* case.<sup>5</sup> We thus have established, by a uniform series of decisions, a departmental rule

<sup>1</sup> *Rocky Mountain C. & I. Co.*, 1 Copp's L. O. 1.

<sup>2</sup> See, *ante*, §§ 137-141.

<sup>3</sup> *In re H. C. Rolfe*, 2 Copp's L. O. 66; *In re W. H. Hooper*, 8 Copp's L. O. 120; *In re Josiah Gentry*, 9 Copp's L. O. 5; *Maxwell v. Brierly*, 10 Copp's L. O. 50; *Conlin v. Kelly*, 12 L. D. 1; *Shepherd v. Bird*, 17 L. D. 82.

<sup>4</sup> 7 Copp's L. O. 83.

<sup>5</sup> 8 Copp's L. O. 120.



of construction, that lands valuable for deposits of lime are mineral in character, and may be entered under the mining laws.

In 1873, the department issued a circular<sup>1</sup> for the guidance of surveyors-general and registers and receivers, wherein it classified borax, carbonate and nitrate of soda, sulphur, alum, and asphalt as minerals, and open to entry under the mining laws. We are not aware that this classification has ever been questioned. But recently Secretary Hoke Smith has established the rule that in administering railroad grants the word "mineral," as used in the reservation clauses, is to be understood to apply only to the more valuable metals, such as gold, silver, cinnabar, and copper.<sup>2</sup>

His argument proceeds upon the theory that at the time of the *passage of the act* wherein mineral lands were reserved, either expressly or by implication, the substances in controversy (phosphates and petroleum) were not minerals in contemplation of congress, and therefore passed to the railroad; that congress at that time only had in contemplation the more valuable metals.

The vice of the distinguished secretary's reasoning is found in his assumption that after the passage of the railroad acts, and before title vests under them, congress has no power to change its policy or enlarge the scope of its legislation with respect to mineral lands. That this view is erroneous, we think we have fully demonstrated in the preceding article on the subject of grants to states for educational purposes.

Secretary Smith's ruling would enable railroad companies in the future to obtain title under the unadministered grants to a large class of valuable deposits, such as limestone, alum, soda, asphalt, marble, borax, sulphur, etc., which, by legislative and judicial construction, are within the purview of the mining laws, although no title to such lands became vested prior to the passage of these laws or

<sup>1</sup> Copp's Min. Decisions, 316.

<sup>2</sup> Tucker *et al.* v. Florida Ry. & Nav. Co., 19 L. D. 414; Union Oil Co., 23 L. D. 222.



the adoption by the land department of the now recognized rules of interpretation.

In the instructions issued to the commissioners appointed under the act providing for the classification of mineral lands within railroad grants in Idaho and Montana, the secretary was not unmindful of the injunction contained in that act, "That all said lands shall be classified as "mineral which, by reason of valuable mineral deposits, "are open to exploration, occupation, and purchase under "the provisions of the United States mining laws."<sup>1</sup> Is this not a legislative declaration that no lands which are subject to entry under those laws shall be patented to a railroad company? We think it is, although we are of the opinion that this was the law prior to the passage of this act.

**§ 159. Test of mineral character of land applied to railroad grants.**—We think we are amply justified in here reiterating the doctrine applied by us to the administration of school land grants.

The question whether a given tract of land within the primary, or place, limits of a railroad grant is mineral, and therefore excepted out of the grant, is to be determined according to the state of the law and the facts as they exist at the time the railroad company applies for its patent. If the mineral character is then established according to the rules announced in section ninety-eight, then it does not pass under the grant.

With respect to indemnity selections, the state of the law and the facts as they exist at the time of the selection is alone to be considered. If the lands sought to be selected fall within the rules announced in section ninety-eight, they cannot be selected by the railroad company.

These rules apply to all railroad grants to the extent that they remain unadministered. As we shall hereafter see, a patent issued to such companies is conclusive evidence that the lands are non-mineral. Consequently,

<sup>1</sup> 20 Land Decisions, 351.

changed conditions arising after the issuance of patents or final approval of selections cannot affect the title.

§ 160. **Classification of railroad lands under special laws in Idaho and Montana.**—To facilitate the administration of the land grants to the Northern Pacific railroad, and to provide for a more expeditious method of determining the character of lands within the primary and indemnity limits of this grant in the states of Idaho and Montana, congress, on February 26, 1895, passed an act, entitled "An act to provide for the examination and classification of certain mineral lands in the states of Montana and Idaho."<sup>1</sup>

This is the act referred to in section one hundred and fifty-eight. It establishes an auxiliary board, consisting of three commissioners for each state, appointed by the president, whose duties are to make examinations in their respective districts, take testimony of witnesses, and generally to investigate the mineral or non-mineral character of the lands within the railroad limits in their respective jurisdictions.

The act makes provision for determining protests and controversies relative to the character of lands, the results of all such investigations to be reported through the customary channels to the land department. The action of this board only becomes final upon the approval of its reports by the secretary of the interior.

It is unnecessary to here detail the particulars of the act. The functions of the board are largely those of referees or "roving commissioners" under the equity practice; and in this aspect it is a mere adjunct of the land department. The secretary of the interior, shortly after the passage of the act, issued elaborate instructions, prescribing the duties of the commissioners, under which they are now acting.<sup>2</sup>

The act, however, possesses some general features of more than passing interest. In addition to the definition of the term "mineral lands," referred to in the preceding section, it provides that in determining the character of the lands

<sup>1</sup> 28 Stats. at Large, 683.

<sup>2</sup> 20 Land Decisions, 351.

the commissioners may take into consideration certain conditions which, according to the previous rulings of the department and the courts, have not been considered as elements of controlling weight.

Thus, where mining locations have been made or patents issued for mining ground in any section of land, this shall be taken as *prima facie* evidence that the forty-acre subdivision within which it is located is mineral land. It is further provided that the examination and classification of lands shall be made without reference or regard to any previous examination, report, or classification; that the commissioners shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands *adjacent* thereto, and the *reasonable probabilities* of such land containing valuable mineral deposits because of its formation, location, or character.

These provisions seem wise and beneficent. As the railroad company has no vested right to any particular class of lands, the rules established by the act can work no legal hardship. What is lost to the company in the place limits may be compensated by selections within the indemnity limits. Nor do we think, taking a common-sense view of the situation, that any cause of complaint could be urged by any land-grant road to which similar laws might be made applicable, even where there are no provisions for indemnity selections. Judge Sawyer<sup>1</sup> and Judge Hawley<sup>2</sup> have both held that lands *reasonably supposed* to be mineral do not pass to the railroad companies; and the mineral character of a given tract may be reasonably inferred from geological conditions and local environment. It is to be hoped that the experiment will prove beneficial, and that like provisions may be made for the adjustment of all railroad land grants within the mineral regions.

<sup>1</sup> *Franceur v. Newhouse*, 40 Fed. 618.

<sup>2</sup> *Valentine v. Valentine*, 47 Fed. 597.

§ 161. **Effect of patents issued to railroad companies.**

—The supreme court of California has held in several cases that in an action at law a patent issued to a railroad company can be attacked by showing that the lands in controversy are mineral lands.<sup>1</sup>

These decisions were based upon the construction of patents which contained the reservation of "all mineral lands, should any be found to exist." Judge Sawyer, in the case of *Cowell v. Lammers*,<sup>2</sup> has conclusively shown that this exception is void, not being authorized by law. However, in later cases the supreme court of California has recognized the rule that when a law of congress provides for the disposal of certain public lands, upon the ascertainment of certain facts, the officers of the land department have jurisdiction to inquire into and determine those facts, and the patent issued thereupon is a conclusive declaration that the facts have been found in favor of the patentee, and that this rule applies to the determination of the particular character of the land which is the subject of the patent.<sup>3</sup>

The federal courts, whose views, in the end, on a question like this must prevail,<sup>4</sup> have from the beginning unhesitatingly announced the rule that the land department has jurisdiction to determine the character of lands, and its determination, culminating in the issuance of a patent, is conclusive. Such patent is not open to collateral attack.<sup>5</sup>

<sup>1</sup> *McLaughlin v. Powell*, 50 Cal. 64, *Chicago Q. M. Co. v. Oliver*, 75 Cal. 194; *Hunt v. Steese*, 75 Cal. 620.

<sup>2</sup> 10 Saw. 246.

<sup>3</sup> *Gale v. Best*, 78 Cal. 235; *Irvine v. Tarbat*, 105 Cal. 237; *Drayfus v. Badger*, 108 Cal. 65.

<sup>4</sup> *Gale v. Best*, 78 Cal. 240.

<sup>5</sup> *Barden v. N. P. R. R.*, 154 U. S. 288; *French v. Ryan*, 93 U. S. 169; *Johnson v. Towsley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 530; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Smelting Co.*, 106 U. S. 447; *Dahl v. Rannheim*, 132 U. S. 290; *Parley's Park S. M. Co. v. Kerr*, 130 U. S. 259; *United States v. Winona & St. P. R. R.*, 67 Fed. 948; *Carter v. Thompson*, 65 Fed. 329. See also, *King v. Thomas*, 12 Pac. 863; *Manning v. San Jacinto Tin Co.*, 7 Saw. 419; *Butte & B. M. Co. v. Sloane*, 40 Pac. 217; *Ah Yew v. Choate*, 24 Cal. 562 (state patent); *Poire v. Wells*, 6 Colo. 406; *Meyerdorf v. Frohner*, 3 Mont. 282.

If mineral lands have been patented under railroad or homestead laws, and were known to be such prior to final entry and certification, such patents may be vacated by the United States.<sup>1</sup>

Authorities might be multiplied indefinitely. Sufficient space has been devoted to this subject at this juncture. We shall have occasion to recur to it again when considering the force and effect of federal patents generally, in a later portion of the work.

§ 162. **Conclusions.**—We are authorized to deduce the following general conclusions from the foregoing exposition of the law:—

(1) That lands embraced within the primary, or place, limits of a railroad grant, whose mineral character is known or established at any time prior to the issuance of a patent, are not patentable to the railroad company, and are excepted out of the grant.

(2) Lands mineral in character within the indemnity limits of any railroad grant, where indemnity selections are authorized by the act, can not be selected in lieu of lands lost to the company within the place limits.

(3) Whether a given tract within either the primary or indemnity limits is mineral or not must be determined according to the state of the law and facts as they exist at the time patent is applied for or application to select is made. Until patent is issued or selections are finally approved, the land department retains jurisdiction to pass upon the character of the land; and its judgment, culminating in the issuance of a patent or final approval of a selection, is conclusive, and not open to collateral attack.

(4) The term “mineral land,” as used in the reservation clauses of railroad grants, includes all valuable deposits, metallic and non-metallic, which are or may be subject to

<sup>1</sup>W. P. R. R. v. United States, 108 U. S. 510; McLaughlin v. United States, 107 U. S. 528; Mullan v. United States, 118 U. S. 271; United States v. Mullan, 7 Saw. 466; United States v. Reed, 12 Saw. 99; United States v. Culver, 52 Fed. 81; Gold Hill Q. M. Co. v. Ish, 5 Ore. 104.

entry under the mining laws, except coal and iron, where these substances are excepted out of the mineral reservation.

(5) Mineral lands within either the primary or indemnity limits of railroad grants, prior to patent or certification, belong to the public domain, and are open to exploration and purchase under the mining laws, the same as any other public mineral lands.

#### ARTICLE V. TOWNSITES.

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| § 166. Laws regulating the entry of townsites.   | department prior to the act of March 3, 1891.   |
| § 167. Rules of interpretation applied to townsite laws.   | § 172. Section sixteen of the act of March 3, 1891, is limited in its application to incorporated towns and cities.                             |
| § 168. Occupancy of public mineral lands for purposes of trade or business.  | § 173. The object and intent of section sixteen of the act of March 3, 1891.  |
| § 169. Rights of mining locator upon unoccupied lands within unpatented townsite limits.   | § 174. The act of March 3, 1891, not retroactive.   |
| § 170. Prior occupancy of public mineral lands within unpatented townsites for purposes of trade, as affecting the appropriation of such lands under the mining laws. The rule prior to the passage of the act of March 3, 1891. | § 175. Effect of patents issued for lands within townsites.   |
| § 171. Correlative rights of mining and townsite claimants recognized by the land  | § 176. What constitutes a mine or valid mining claim within the meaning of section twenty-three hundred and ninety-two of the Revised Statutes. |
|  | § 177. In what manner may a townsite patent be assailed by the owner of a mine or mining claim.   |

§ 166. Laws regulating the entry of townsites.—The laws of the United States providing for the reservation and sale of townsites on the public lands are found in title thirty-two, chapter eight, of the Revised Statutes, sections twenty-three hundred and eighty to twenty-three hundred and ninety, supplemented by section sixteen of the act of

March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes."<sup>1</sup>

These laws provide three methods of acquiring title to town property on the public domain:—

(1) Where the president of the United States has directed the reservation provided for by section twenty-three hundred and eighty of the Revised Statutes;

(2) In cases where towns have already been established, or parties desire to found a town under the provisions of section twenty-three hundred and eighty-two;

(3) Under section twenty-three hundred and eighty-seven, by the terms of which the entry of land settled and occupied as a townsite may be made by the corporate authorities, if the town be incorporated, or, if unincorporated, by the county judge, for the use and benefit of the several occupants.

We have no particular concern with townsites falling within sections twenty-three hundred and eighty or twenty-three hundred and eighty-two.

Section twenty-three hundred and eighty-seven is but a restatement or codification of the law as it existed at the time of the revision.<sup>2</sup>

It is under this section and the acts from which it was framed that most of the flourishing towns of the west have applied for and received patents, and it is the only one of the three methods of acquiring title to town property on the public lands which requires particular consideration at our hands,<sup>3</sup> although the principles of law discussed apply to all classes of townsites, by whatsoever method they are sought to be acquired.

Section twenty-three hundred and eighty-seven of the Revised Statutes is as follows:—

<sup>1</sup> 26 Stats. at Large, 1095.

<sup>2</sup> Act of March 2, 1867, 14 Stats. at Large, 541; Act of June 8, 1868, 15 Stats. at Large, 67.

<sup>3</sup> Public Domain, 298, 299.



"Whenever any portion of the public lands have been  
 "or may be settled upon and occupied as a townsite, not  
 "subject to entry under the agricultural pre-emption laws,  
 "it is lawful, in case such town be incorporated, for the cor-  
 "porate authorities thereof, and if not incorporated, for the  
 "judge of the county court for the county in which such  
 "town is situated, to enter at the proper land office, and at  
 "the minimum price, the land so settled and occupied, in  
 "trust for the several use and benefit of the occupants  
 "thereof, according to their respective interests; the execu-  
 "tion of which trust, as to the disposal of the lots in such  
 "town, and the proceeds of the sales thereof, to be conducted  
 "under such regulations as may be prescribed by the legis-  
 "lative authority of the state or territory in which the  
 "same may be situated."

The townsite acts and the chapter of the Revised Statutes into which their provisions are incorporated, contain certain restrictions and limitations upon the subject of mineral lands, which are necessary to be considered for the purpose of obtaining a proper understanding of the adjudicated cases, and to enable us to draw correct conclusions as to the rules of interpretation to be applied. These restrictions and limitations are as follows. —

Section twenty-three hundred and eighty-six of the Revised Statutes provides that,—

... "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in the possessors for mining purposes as against the United States."

This is but a re-enactment of the proviso contained in the act of March 3, 1865,<sup>1</sup> and, of course, its original enactment antedates all legislation of congress, granting in express terms the right to explore and acquire by location any class of public mineral lands. Considering the state of the law on the subject of this class of lands at the time

<sup>1</sup> 13 Stats. at Large, 530.

of the revision of the federal statutes (December, 1873), it would seem that this section, framed to apply to conditions which no longer existed, was superfluous, and might with all propriety have been omitted. Since the original act was passed, congress, by its legislation, has given to valid mining locations the status of legal estates. As the law now stands, no possession of public mineral lands can be lawfully recognized by local authority which possession is not acquired and held under the sanction of the general mining laws. So far as an intelligent interpretation of the townsite laws is sought, under existing conditions, section twenty-three hundred and eighty-six performs but little, if any, function beyond that of an historical landmark or a link in the chain of evolution.

The act of March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon public lands," contained the following provision:—

"No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper."<sup>1</sup>

At the time this act was passed, the first mining act of July 26, 1866, was in full force, which declared that the mineral lands of the public domain should thereafter be free and open to exploration and occupation, and provided for the acquisition of title to veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, and copper. It is obvious that the townsite act of 1867 was framed in the light of the first mining act. The act of June 8, 1868, added to the above quoted provisions of the act of March 2, 1867, the following clause:—

. . . "or to any valid mining claim or possession held under existing laws."<sup>2</sup>

The foregoing provisions of the two acts were united and incorporated into the Revised Statutes, and are embodied in section twenty-three hundred and ninety-two of

<sup>1</sup> 14 Stats. at Large, 541.

<sup>2</sup> 15 Stats. at Large, 67.

the chapter relating to townsites, which now reads as follows:—

"SEC. 2392. No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws."

It may be noted that the mining act of May 10, 1872, which was in force when the Revised Statutes went into effect, covered claims for lands bearing gold, silver, cinnabar, *lead, tin, copper, or other valuable deposits*, the words in italics not appearing in either the act of 1866 or the townsite laws.

As thus outlined, these laws stood, were construed and interpreted by the highest courts in the land, and a fair understanding of their provisions was about being reached, when congress, by a provision inserted in the "Act to repeal the timber-culture laws, and for other purposes," passed March 3, 1891, (principally *for other purposes*),<sup>1</sup> injected some new elements into the townsite laws which thus far have not received the attention of the courts. The provisions referred to are found in section sixteen of the act in question, and are as follows:—

"SEC. 16. That townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof; and when entry has been made or patent issued for such townsites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein and the surface ground appertaining thereto; *provided*, that no entry shall be made by such mineral vein claimant for surface ground where the owner or occupier of the surface

<sup>1</sup> 26 Stats. at Large, 1095.

“ground shall have had possession of the same before the inception of the title of the mineral vein applicant.”

To what extent this act is an innovation upon the system theretofore existing, and how far the rules of law theretofore established by the current of judicial authority are strengthened, weakened, or have become obsolete, will be noted as we proceed.

It appears, however, that the act is limited in its application to incorporated cities or towns, and its provisions do not apply to cases of townsite entries made by the county judge or the judicial officer performing his functions for the use and benefit of the occupants, or entries made by trustees appointed by the secretary of the interior. In enumerating the minerals, the act adds *lead* to the category, as found in section twenty-three hundred and ninety-two of the Revised Statutes.

**§ 167. Rules of interpretation applied to townsite laws.**—It is not to be inferred from the caption to this section that in construing the townsite laws we are authorized or required to invoke any rules of interpretation peculiar to this branch of the public land laws. We are called upon simply to apply general rules, and note the instances where special application of these rules to the laws under consideration has been made by the courts.

The townsite laws, as they now exist, consist simply of a chronological arrangement of past legislation, an aggregation of fragments, a sort of “crazy quilt,” in the sense that they lack harmonious blending. This may be said truthfully of the general body of the mining laws. The rules adopted for the interpretation of the one apply with equal force to the other.

We have endeavored to formulate these rules in a preceding section.<sup>1</sup> We may supplement these with another rule specially applicable; *i. e.* the townsite laws are to be read and construed in connection with all the existing legislation of congress regulating the sale and disposal of

<sup>1</sup> See, *ante*, § 96.

the public lands—that is, these laws are to be considered with all other laws which are essentially *in pari materia*.

**§ 168. Occupancy of public mineral lands for purposes of trade or business**—Important mineral discoveries in new quarters, however remote from civilized centers, are invariably followed by a large influx of population. The advance guard sets its stakes upon the most convenient spot, erects tents, or constructs primitive habitations, which form the nucleus of the future town. As was said by Judge Field, speaking for the supreme court of the United States, -

"Some of the most valuable mines in the country are within the limits of incorporated cities which have grown up on what was, on its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization of some form of local government for the protection of its members. Exploration in the vicinity for other mines is pushed in such case by new-comers with vigor, and is often rewarded with the discovery of valuable claims."<sup>1</sup>

That conflicts should arise between mineral claimants and occupants of lands for purposes of business and trade in the newly discovered mineral regions is but natural. Frequently these controversies are of an aggravated nature, and resort to force is a matter of common occurrence, particularly so before the organization of any form of local government. But eventually the more important ones find their way into the courts, whose decisions have resulted in establishing certain definite rules of law, governing the respective rights of the miner and the merchant within the limits of the settlement. These limits are not always

<sup>1</sup> *Steel v. St. Louis Smelting Co.*, 106 U. S. 447, 449; *Deffeback v. Hawke*, 115 U. S. 392, 406.

well defined. Until application is made to enter and purchase the townsite, the exact area which may properly be considered as within the site of the future town, may be limited by the extent of actual occupancy. In some instances, some enterprising individual surveys a tract of land into lots and blocks, streets and alleys, thus giving a semblance to a claim within the exterior limits of the survey. When such town is incorporated, the territorial limits over which municipal jurisdiction is asserted are, of course, defined by the act of incorporation. When application is made to enter the townsite by the town authorities, if incorporated, or by the county judge, if unincorporated, the area which may be thus entered will depend upon the number of inhabitants, the maximum area allowed being twenty-five hundred and sixty acres.<sup>1</sup>

It frequently happens that a large portion of this area, as finally entered and patented, is unoccupied, and remains so indefinitely. We are called upon to determine the respective rights of the two classes of claimants within the asserted limits of the townsite, both before and after patents are issued to one or the other.

**§ 169. Rights of mining locator upon unoccupied lands within unpatented townsite limits.**—It is hardly necessary to state that the owner of a valid and subsisting mining location which had its inception at a time prior to any occupancy within the surface limits of his claim, for purposes of trade or business, cannot be deprived of any of his rights flowing from such location by settlement thereon of later arrivals desiring to engage in commercial traffic or to assist in the founding of a city. The land embraced within the mining location is just as much withdrawn from the public domain as the fee is by a valid grant from the United States under authority.<sup>2</sup> Such location is a grant from the government.<sup>3</sup>

<sup>1</sup> Rev. Stats., § 2389.

<sup>2</sup> *Silver Bow M. & M. Co. v. Clark*, 5 Mont. 406.

<sup>3</sup> *Butte City Smokehouse Lode Cases*, 6 Mont. 397; *Belk v. Meagher*, 104 U. S. 284; *Gwillim v. Donnellan*, 115 U. S. 45, 49.



There is no room for a further grant; for the government would have nothing to convey.<sup>1</sup>

That the mining location is within the claimed or actual limits of the unpatented townsite is therefore of no moment. As was said by the supreme court of the United States,—

"To such claims, though within the limits of what may be termed the site of the settlement or new town, the miner acquires as good a right as though his discovery was in a wilderness."<sup>2</sup>

§ 170. **Prior occupancy of public mineral lands within unpatented townsites for purposes of trade as affecting the appropriation of such lands under the mining laws—The rule prior to the passage of the act of March 3, 1891.**—In discussing the effect of a prior occupancy of public mineral lands for townsite purposes, upon the right of subsequent appropriation under the mining laws, it is our purpose to first arrive at a correct understanding, if it be possible, of the state of the law as it existed prior to the passage of the act of March 3, 1891. This will enable us to consider "the old law, the mischief, and the remedy" in logical order.

In a subsequent article,<sup>3</sup> we have endeavored to state the law, generally, with reference to the rights of mere occupants of public lands without color of title, as against one seeking to appropriate such lands under the mining laws. Much that is there said will apply to the subject presently under consideration, and need not be here repeated. We deem it sufficient for our present purpose to deal with those cases wherein the courts have had under consideration controversies between mining claimants and prior occupants for the purposes of trade or business—*i. e.* under the townsite laws.

In reviewing the decisions of the supreme court of the United States upon this and kindred subjects, we meet with

<sup>1</sup>Silver Bow M. & M. Co. v. Clark, 5 Mont. 406.

<sup>2</sup>Steel v. St. Louis Smelting Co., 106 U. S. 447, 449; Deffebach v. Hawke, 115 U. S. 302.

<sup>3</sup>See, *post*, art. x., §§ 216-219.



apparent contradictions, rendering it difficult to reach satisfactory conclusions. Language employed in one decision, construed literally, cannot be harmonized with expressions found in another. One case does not necessarily overrule the other, as the ultimate results reached are consistent one with the other; but an analysis of the reasoning employed and the terms used in reference to the question now being considered have a tendency to raise different inferences in different cases.

In none of the reported cases, other than those decided by the land department, do we find the question presented between the two classes of claimants unaided by presumptions flowing from a patent.

In all such cases coming under our observation an attempt has been made to collaterally assail a federal patent, issued to either the townsite or the mineral claimant. In some instances both classes of claimants possessed patents. In all of these cases the operative force of the patent as a judgment, and its conclusiveness upon collateral attack, have rendered the consideration of conditions existing prior to its issuance to a large extent unnecessary. With these preliminary suggestions we proceed to examine the decisions.

The supreme court of the United States has made use of the following language:—

“Land embraced within a townsite on the public domain,  
“when *unoccupied*, is not exempt from location and sale for  
“mining purposes. Its exemption is only from settlement  
“and sale under the pre-emption laws of the United  
“States. . . . The acts of congress relating to townsites  
“recognize the possession of mining claims within their  
“limits, and forbid the acquisition of any mine of gold,  
“silver, cinnabar, or copper within them under proceed-  
“ings by which title to other lands there situated are  
“secured, thus leaving the mineral deposits within the  
“townsites open to exploration, and the land in which  
“they are found to occupation and purchase in the same  
“manner as such deposits are elsewhere explored and  
“possessed, and the lands containing them are acquired.

"Whenever, therefore, mines are found in lands belonging to the United States, whether within or without townsites, they may be claimed and worked, provided existing rights of others from prior occupation are not interfered with."<sup>1</sup>

The italics employed in the excerpt are ours. Literally construed, it would appear that the supreme court had in mind all classes of occupancy of the public lands, thus giving sanction to the rule that occupancy for trade or business purposes on lands confessedly mineral prevents their appropriation under the mining laws, although such appropriation might be effected without force or violence.<sup>2</sup>

In the case of *Davis & Weibbold*, the same court, referring to its language used in *Steel v. Smelting Company*, says: -

"It was in reference to mines in *unoccupied* public lands in unpatented townsites that the language was used; and to them, and to mines in public lands in patented townsites outside of the limits of the patent, it is only applicable."<sup>3</sup>

This seems to strengthen the inference that prior occupancy for townsite purposes, although upon land confessedly mineral, withdraws it from appropriation under the mining laws.

In the same case, the court, referring to the case of *Deffeback v. Hawke*,<sup>4</sup> thus states its views:—

"In *Deffeback v. Hawke*, the mining patentee's rights antedated those of the occupants under the townsite law, and wherever such is the case his rights will be enforced against the pretensions of the townsite holder; but where the latter has acquired his rights in advance of the discovery of any mines, and the initiation of proceedings for the acquisition of their title or possession, his rights will be deemed superior to those of the mining claimant."<sup>5</sup>

<sup>1</sup> *Steel v. St. Louis Smelting Co.*, 106 U. S. 447, 449.

<sup>2</sup> The land department, however, cites this case as authority for the rule that the occupancy of land by townsite settlers is no bar to its entry under the mining laws, provided the land is mineral, and belongs to the United States. *In re Rankin*, 7 L. D. 411.

<sup>3</sup> 139 U. S. 507, 529.

<sup>5</sup> 139 U. S. 526.

<sup>4</sup> 115 U. S. 392.

When we consider the circumstances surrounding the Deffebach-Hawke case (hereafter more fully discussed), where there were two patents issued—one to the mining claimant, and one to the townsite, the former by relation to the certificate of purchase being the senior,—and the admitted facts that the land was occupied for townsite purposes prior to the inception of the mineral right, we must conclude that the supreme court in speaking of the *rights* of a townsite claimant referred to *rights under the townsite patent*. Otherwise, the statement that the “mining” patentee’s rights antedated those of the occupants” would be in direct conflict with the facts which were admitted for the purpose of the decision.

In *Steel v. Smelting Company*, an action of ejectment, the townsite claimants endeavored to assail a patent issued to a mineral claimant upon the ground that the land embraced in such patent was, prior to the initiation of the mining right, occupied and improved for townsite purposes. It was held that the patent could not be thus collaterally assailed.<sup>1</sup>

*Davis v. Weibbold* was a case involving a tract of land in the townsite of Butte, Montana, for which a patent had been issued in 1877. There was no suggestion that at the time the townsite was patented the land was known to be mineral, or that there were any valuable mineral lands within the townsite. The mineral claimant asserted rights under a mineral patent issued in 1880, based upon a discovery and appropriation made years after the issuance of a patent to the townsite. It was held that the discovery of minerals after the issuance of the townsite patent could not affect the holder of the townsite title.<sup>2</sup>

The case of *Hawke v. Deffebach*<sup>3</sup> was an action of ejectment. It involved a placer claim within the limits of the townsite of Deadwood, Dakota. The land became subject to the operation of the public land laws, February 28, 1877,

<sup>1</sup> 106 U. S. 447.

<sup>2</sup> 139 U. S. 507.

<sup>3</sup> 4 Dak. 21.

by the extinguishment of the Indian title, by treaty with the Sioux Indians. The precise date of the location of the mining claim does not appear. The application for patent therefor was filed on November 10, 1877, the entry and payment were made on January 31, 1878, and patent issued on January 31, 1882. No protest or adverse claim was filed. In July, 1878, the town of Deadwood being unincorporated, the probate judge entered at the local land office the townsite, paid the government price therefor, and received duplicate receipt, in trust for the use and benefit of the occupants.

The defendant, Deffeback, was the owner of a lot within the townsite. His contention was that upon the extinguishment of the Indian title the tract in question was, with other lands, laid out into lots, blocks, streets, and alleys, for municipal purposes and for trade; that the land in controversy was one of the lots originally laid out and occupied for townsite purposes, and had always been thus occupied by defendant and his grantor, with the buildings and improvements thereon, for the purposes of business and trade, and not for agriculture; that the placer mining claim was not located or claimed by plaintiff or any other person until after the selection and settlement upon and appropriation of that and adjacent lands for townsite purposes.

The mineral character of the land was not disputed. The foregoing facts were deemed admitted for the purpose of the decision. They were set up as an equitable defense, and a decree was asked by the owner of the town lot adjudging that the holder of the placer patent was a trustee for the benefit of the prior townsite occupant.

The supreme court of Dakota, in an able opinion, sustained a demurrer interposed to the equitable defense, and, the defendant failing to amend, judgment was entered for the mining patentee.

The case was appealed to the supreme court of the United States, from whose opinion we select the following extracts:—

“ It is plain, from this brief statement of the legislation  
“ of congress, that no title from the United States to land  
“ known at the time of the sale to be valuable for its min-  
“ erals of gold, silver, cinnabar, or copper can be obtained  
“ under the pre-emption or homestead laws, or the townsite  
“ laws, or in any other way than as prescribed by the laws  
“ specially authorizing the sale of such lands, except in the  
“ state of Michigan (and other states). . . . In the present  
“ case there is no dispute as to the mineral character of the  
“ land claimed by plaintiff. It is upon the alleged prior  
“ occupation of it for trade and business, the same being  
“ within the settlement or townsite of Deadwood, that  
“ defendant relies, as giving him a better right to the prop-  
“ erty. But the title to the land being in the United States,  
“ its occupation for trade or business did not and could not  
“ initiate any right to it, the same being mineral land, nor  
“ delay proceedings for the acquisition of the title under  
“ the laws providing for the sale of lands of that character.”<sup>1</sup>

In a later portion of the decision, when dealing with the effects of a townsite patent within the limits of which are found land that was known to be mineral at the date of the townsite patent, and also lands that were not so known, the supreme court supplements the foregoing with the following:—

“ Whilst we hold that a title to known valuable mineral  
“ land can not be acquired under the townsite laws, and  
“ therefore could not be acquired to the land in contro-  
“ versy under the entry of the townsite of Deadwood by  
“ the probate judge of the county in which that town is  
“ situated, we do not wish to be understood as expressing  
“ any opinion against the validity of the entry, so far as it  
“ affected property other than mineral lands, if there were  
“ any such at the time of entry. . . . It would seem,  
“ therefore, that the entry of a townsite, even though  
“ within its limits mineral lands are found, would be as  
“ important to the occupants of other lands as if no min-  
“ eral lands existed. Nor do we see any injury resulting  
“ therefrom, nor any departure from the policy of the gov-  
“ ernment, the entry and the patent being inoperative as  
“ to all lands known at the time to be valuable for their  
“ minerals or discovered *to be such before their occupation or*  
“ *improvement for residences or business under the townsite title.*”<sup>2</sup>

<sup>1</sup> Deffeback v. Hawke, 115 U. S. 392, 405.

<sup>2</sup>Id. 407.

The language last quoted has led some of the trial courts into the error of ruling that mines discovered within *patented* townsites before the occupation of a lot for business or residence purposes could be held as against the grantee from the townsite, although not discovered until after patent to the townsite had issued.<sup>1</sup>

The question as to whether a mining location could be legally made on mineral lands in possession of a prior occupant for business purposes within the limits of an unpatented townsite *was* raised in the Deffeback-Hawke case, and while the issuance of a patent to the mineral claimant, without any adverse claim or protest on the part of the townsite claimant, and prior to the entry of the townsite, was a conclusive determination that the lands were mineral and rightfully patented to the mineral claimant, the decision of the supreme court of the United States does hold, as that court has uniformly held, that mineral lands could only be appropriated under the mining laws, and that no title to such lands could be initiated by mere occupancy under the townsite laws. The time when the character of the land within a claimed townsite is to be determined is when application to enter is made. This is the rule as to all classes of grants, such as grants to states other than sixteenth or thirty-sixth sections,<sup>2</sup> grants to railroads within both place and indemnity limits,<sup>3</sup> and entries under the pre-emption and homestead laws.<sup>4</sup> If the lands are mineral, the fact of their mere occupancy for purposes of trade or business is of no moment. Such occupancy is not color of title as against the government or those in privity with it, and a mining locator is in such privity.

The case of Sparks v. Pierce was considered by the supreme court of the United States at the same time as Deffeback v. Hawke, and involved the same controversies, with the exception that no application to enter the townsite (Central City, Dakota) had been made. The case pre-

<sup>1</sup> McCormick v. Sutton, 97 Cal. 375.

<sup>2</sup> See, *ante*, §§ 156, 157.

<sup>3</sup> See, *ante*, §§ 140, 143.

<sup>4</sup> See, *post*, § 207.



sented was that of occupants of the public lands without title resisting the enforcement of the patent of the United States, on the ground of occupation antedating the acquisition of any mining right or claim of right.

The court held that—

“Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them.”<sup>1</sup>

When the application for the mineral patent in this case was before the land department, the commissioner of the general land office held, that although it was sufficiently established that the land was occupied for townsite purposes prior to the initiation of rights under the mining claim, yet, as the lands were in fact mineral, the occupants had no right to it. Patent was issued to the mineral claimant in accordance with this ruling, without any reservation. The townsite claimants endeavored to erect a trust upon the mineral patent, on the ground that the commissioner erred as a matter of law in issuing the mineral patent without reserving their asserted rights as occupants. Concerning this plea, the supreme court held that “to entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the land department, and, being respected, would have given him the patent.”

There can be no doubt that the case clearly indicates that priority of occupation of mineral lands for townsite purposes establishes no claim which the government is called upon to recognize, as against a subsequent appropriation under the mining laws.

Considering the facts involved in the several cases which we have heretofore reviewed, and construing the townsite laws in connection with the general mining laws and other enactments *in pari materia*, we feel that we are

<sup>1</sup>115 U. S. 408, 413.



justified in the conclusion that the supreme court of the United States never intended to establish the rule that prior occupancy of the public mineral lands for trade or business purposes operated to withdraw such lands prior to the issuance of a townsite patent from appropriation under the mining laws, provided always that such appropriation was effected by peaceable methods, and without resort to force or violence. The expressions found in the cases noted leading to a contrary inference were not intended to be of controlling weight. There may be some room for doubt as to the correctness of the conclusions reached by us; but we are forced to accept one of the two constructions. We have adopted that which to us seems to be in consonance with the general theories of the public land laws, according to the tenor of all the decisions promulgated by the court of last resort. We can conceive of no middle ground. If prior occupants for townsite purposes were to be considered as being entitled to equities as against the subsequent mining locators, there would have been no necessity for the legislation found in section sixteen of the act of March 3, 1891. The conclusions here reached are in harmony with the views of the supreme court of Montana<sup>1</sup> and the supreme court of Arizona;<sup>2</sup> also, of the land department since the decision in *Steel v. Smelting Company*.<sup>3</sup>

§ 171. Correlative rights of mining and townsite claimants recognized by the land department prior to the act of March 3, 1891.—In passing upon applications for patents to mineral lands within the claimed limits of townsites, the land department has until within a comparatively recent period proceeded upon the theory that there were correlative or reciprocal rights existing between townsite occupants and mineral claimants which were to

<sup>1</sup> *Talbot v. King*, 6 Mont. 76; *Silver Bow, M. & M. Co. v. Clark*, 5 Mont. 406; *Butte City Smokehouse Lode Cases*, 6 Mont. 397; *Chambers v. Jones*, 42 Pac. 758.

<sup>2</sup> *Tombstone Townsite Cases*, 15 Pac. 26; *Blackmore v. Reilly*, 17 Pac. 72.

<sup>3</sup> *In re Rankin*, 7 L. D. 411. See, also, *Goldstein v. Townsite of Juneau*, 3 L. D. 417.

be regarded and properly provided for when patents were issued.

General Burdett, when commissioner of the general land office, thus expressed his views:—

“The townsite laws clearly contemplate that towns will exist in mining localities; by clear implication, townsite entries are to be permitted on mineral lands. This is indicated by the clause excepting title to mines from the title acquired by the town. It is inevitable that where the surface is suitable, it will, in a mining vicinity, be populated, and attain the character of a town or city. Where any branch of business flourishes, there capital and population will concentrate. The various trades and callings will center there. Hotels will be a necessity. Dwellings will be built, and permanent homes established; all the various interests which constitute valuable property rights as connected with the soil will be created. And this is not necessarily antagonistic to the miners. The protection of municipal government is in the miner’s interest, as it is in the interest of any other class of business men.”<sup>1</sup>

The secretary of the interior had previously held that persons in possession of the surface of a lode claim were adverse claimants within the meaning of the mining law of 1866, and were entitled to be heard in the local courts before patent was issued.<sup>2</sup>

Out of this and similar rulings, originated the practice of inserting reservation clauses in mineral patents to lode claims of the following character:—

“Excepting and excluding from said patent all townsite property rights upon the surface, and all houses, buildings, lots, blocks, streets, alleys, or other municipal improvements on the surface of said mining claim not belonging to the grantees, and all rights necessary or proper to the occupation, possession, and enjoyment of the same.”

Such reservations, however, were not inserted, it seems, where the discovery and location of the mining claim antedated the town settlement.<sup>3</sup>

<sup>1</sup>Townsite of Central City, Colo., 2 Copp’s L. O. 150.

<sup>2</sup>Becker v. Central City Townsite, 2 Copp’s L. O. 98. See, also, Papina v. Alderson, 10 Copp’s L. O. 52.

<sup>3</sup>Monroe Lode, 4 L. D. 273.

In townsite patents, in addition to the limiting clause sanctioned by section twenty-three hundred and ninety-two of the Revised Statutes the following proviso, or its equivalent, was inserted:—

"That the grant hereby made is held and declared to be subject to all the conditions and restrictions contained in section twenty-three hundred and eighty-six of the Revised Statutes of the United States, so far as the same are applicable thereto."<sup>1</sup>

A different rule prevailed with reference to placer patents, for the reason that in this class of mining claims the surface of the ground is absolutely necessary to the successful working of the mine; therefore, it could not be included in a townsite entry or patent, nor could any surface rights therein be reserved, under any circumstances, to the townsite occupant.<sup>2</sup>

But the courts have uniformly held these reservations void. The officers of the land department are merely agents of the government, and have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents of their own description, they could limit or enlarge without warrant of law.<sup>3</sup>

In accordance with this action by the courts, the land department considers it to be fully established as a principle of law that the government could not (at least prior to March 3, 1891) by its patent "partition lands horizontally,"

<sup>1</sup>Turner v. Lang, 1 Copp's L. O. 51; Central City Townsite, 2 Copp's L. O. 150; Butte City Townsite, 3 Copp's L. O. 114, 131; Hickey's Appeal, 3 L. D. 83; Com'rs' Letter, Copp's Min. Dec. 207; Townsite of Eureka Springs v. Conant, 8 Copp's L. O. 3; Papina v. Alderson, 10 Copp's L. O. 62; Rice Townsite, 1 L. D. 556; Vizima Cons. M. Co., 9 Copp's L. O. 92; Esler v. Townsite of Cooke, 4 L. D. 212.

<sup>2</sup>Townsite of Butte, 3 Copp's L. O. 119; Townsite of Deadwood, 8 Copp's L. O. 18, 153; Com'rs' Letter, Copp's Min. Dec. 156; Kemp v. Starr, 5 Copp's L. O. 180.

<sup>3</sup>Davis v. Weinhold, 139 U. S. 507; Doffleback v. Hawke, 115 U. S. 392; Talbot v. King, 6 Mont. 76; Butte City Smokerhouse Lode Cases, 6 Mont. 897.

and the practice of inserting these correlative reservations ceased.<sup>1</sup>

§ 172. Section sixteen of the act of March 3, 1891, is limited in its application to incorporated towns and cities.—We have in a previous section<sup>2</sup> quoted the provisions of the act of March 3, 1891, so far as it supplements the prior existing townsite laws. It is manifest that this supplemental legislation was intended to apply only to cases of *incorporated* towns, the territorial limits of which are subject to an organized form of municipal government. As to towns and settlements upon the public mineral domain for townsite purposes which are unincorporated, including those which must be entered and patented to the county judge, or the judicial officer performing his functions, as well as all other classes of townsites, the townsite laws, as heretofore understood and explained by the courts, as shown in the preceding sections, remain in force, and are unaffected by the act of March 3, 1891. We are not aware that any judicial interpretation of this act has yet been made. We reason simply from the language of the text and the application of the familiar rule, *Expressio unius est exclusio alterius*. The land department has not, to our knowledge, issued any circular instructions giving its views upon the act in question; nor do we find that the act has been referred to by the department in any of its decisions, except in a case involving the townsite of Juneau, in the district of Alaska.

The act providing a civil government for Alaska, passed May 17, 1884,<sup>3</sup> provided for a government for this district, and made it a land district of the United States, over which was extended only the mineral laws of the United States. The general laws of Oregon, then in force, were declared to be the law of the district. The act also preserved the *status*

<sup>1</sup> W. A. Simmons *et al.*, 7 L. D. 283; Antediluvian Lode & Millsite, 8 L. D. 602; Secretary's Letter, 5 L. D. 256.

<sup>2</sup> See, *ante*, § 166.

<sup>3</sup> 23 Stats. at Large, 24.

*quo* as to use and occupancy for other than mining purposes until congress should act, and declared that nothing in the act should be construed to put in force in said district the general land laws of the United States.

By section eleven of the act of March 3, 1891, (section sixteen of which we are now considering), the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes (the townsite law) were made applicable to Alaska, with the proviso that the entry of the townsites should be made by a trustee or trustees designated by the secretary of the interior, for the use and benefit of the occupants.

The trustee appointed by the secretary made application to enter the townsite of Juneau, against which a protest was filed by a mineral claimant, and the question involved was the mineral or non-mineral character of the land.

The secretary of the interior thus states his views:—

"Looking to the provisions of the act of May 17, 1884, "and of the act of March 3, 1891, it seems to have been the "purpose of congress to permit and authorize mineral prospecting and mining upon lands owned by the United States, "and merely occupied by others, for some purpose other "than mining, provided that such mining operations did "not interfere with such occupancy. There is no complaint "that the mineral claimant in his discovery and development work interfered with the occupancy of any person "in possession at the date of the passage of the act of May "17, 1884, or at the time the work was done. The townsite application and entry made pending the mineral "location, and with a view to obtaining patent to the "entire interest in all the land included in said mineral "location, puts the townsite in the attitude of asserting "the non-mineral character of all of said land, and of assuming the burden of establishing that fact by proof."<sup>1</sup>

The finding was that the land was mineral, and the secretary directed that the townsite entry should be canceled as to the land covered by the mineral location. As the town of Juneau was not an incorporated town, we can not see how section sixteen of the act of March 3, 1891, could

<sup>1</sup>Goldstein v. Townsite of Juneau, 23 L. D. 417, 420.

be considered as a factor. It would seem that the extension, by section eleven of that act, of the provisions of the federal townsite laws over the district of Alaska operated *propria vigore* to inhibit the acquisition of mineral lands under the townsite laws; and the town being unincorporated, there was no sanction for the consideration of correlative rights between miner and townsite occupant. It is true that the act of May 17, 1884, provided in terms that the *status quo* as to use and occupancy for other than mining purposes should be preserved until congress should act. But by extending the provisions of the townsite laws over the district *it acted*. The general mining laws having been put in force by the act of 1884, the townsite provisions, subsequently made applicable, are necessarily to be construed in the light of the mining laws theretofore in force. It follows that the rules of construction, as applied by the courts to the system thus extended to Alaska, have the same controlling force there as elsewhere. There is nothing in the decision of the secretary in this case which suggests that section sixteen of the act of March 3, 1891, applies to other than incorporated towns. The act seems to be clear and unambiguous in this respect.

§ 173. **The object and intent of section sixteen of the act of March 3, 1891.**— We think that an analysis of this act, when considered with reference to the state of the law as it existed at the time of its enactment, viewed in connection with those statutes *in pari materia* remaining in force, justifies us in deducing the following as the true object and intent of the law:—

(1) The old law inhibited the acquisition of title to mineral lands under townsite laws, whether located as such under the mining laws at the time of the proposed townsite entry or not. The land department at the time application was made to enter under the townsite was called upon to investigate the character of the land. If its mineral character was established, patent could not issue, although it might not be occupied or claimed by any one



under the mining laws. The new law permits mineral lands within incorporated towns, if so unoccupied and unclaimed, to be entered under the townsite law. It would therefore seem that, as to future entries applied for by this class of towns, the character of the land, if unoccupied and unclaimed under the mining laws, is not a fact necessarily to be passed upon by the department. If mineral, the fact of the existence or non-existence of such occupancy or claim must necessarily be adjudicated prior to the issuance of a patent. The probable force of such a patent and its unassailable character on collateral attack will be considered in a subsequent section. This much may be here said, however. The issuance of such patent to an incorporated city or town is no longer a conclusive determination that the land was non-mineral in character, as the department has now, under a certain state of facts, the power to issue townsite patents for mineral lands. It may be that such patent would be conclusive evidence of the patentability of such lands under the townsite laws.

(2) The provisions of section twenty-three hundred and ninety-two of the Revised Statutes, that,—

“ . . . no title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession under existing laws,”

and of section twenty-three hundred and eighty-six, that—

“ . . . where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof,”

are re-enacted. To this last provision, which, as we have heretofore shown,<sup>1</sup> was passed prior to the enactment of the lode law of July 26, 1866, is added the following:—

“ . . . and when entry has been made or patent issued for such townsites to such incorporated town or city, the possessor of such mineral vein may enter and receive

<sup>1</sup> See, *ante*, § 166.



“patent for such mineral vein, and the surface ground  
“appertaining thereto.”

The purpose of this supplemental clause is evidently to relieve the land department from embarrassments caused by their previous construction of the prior existing law. That department had held that with the issuance of a townsite patent their jurisdiction as to all land embraced therein terminated, and that, although the law as well as the patent contained the proviso that no title should be thereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws, and although it may be sufficiently established that at the date of the issuance of the patent there existed within the limits of the townsite as patented such a mine or claim as was clearly within the proviso, yet it had no power to issue a patent to such claim; that the only remedy was by a proceeding in equity, brought by the United States to annul the townsite patent.<sup>1</sup>

At one time a contrary rule obtained.<sup>2</sup>

(3) As to placers, if they are unclaimed under the mining laws, they may be patented by an incorporated city or town. Patents may issue on valid placer locations within such limits, independently of prior occupation, for purposes of trade or business; but only one patent may issue, as no correlative rights between townsite and mineral claimants are possible.

(4) Where the right to a lode claim originates after settlement within the surface boundaries for townsite purposes, the prior townsite occupant is entitled to be protected in his surface rights, if they are not on the vein or lode; and it is probable that the extent and boundaries of such surface occupation will be required to be shown through adverse proceedings. Heretofore such adverse proceedings

<sup>1</sup> Pacific Slope Lode, 12 L. D. 686; Cameron Lode, 13 L. D. 369; Protector Lode, 12 L. D. 662; Plymouth Lode, *Id.* 513.

<sup>2</sup> South Comstock G. & S. M. Co., 2 Copp's L. O. 146; Townsite of Butte, 3 Copp's L. O. 114; *Id.* 130.

were not sanctioned, as nothing could inure to the townsite claimant by virtue of such proceedings. He could obtain no patent, and the law made no provision for the severance of any portion of the surface for his benefit.<sup>1</sup>

The provisions of the law of March 3, 1891, in this behalf will require either a segregation of such surface at the time lode patents are issued or the insertion of reservation clauses, protecting prior surface occupants, and defining the extent of such occupancy. The act undoubtedly gives sanction to a practice as to lode claims within townsites which has heretofore been declared by the courts to be improper.

Except as herein announced, we do not understand that the townsite laws, as they existed prior to March 3, 1891, have been modified.

**§ 174. The act of March 3, 1891, not retroactive.—**

There is nothing in the terms of the act making it retrospective in its operation. The language clearly indicates that it was intended to apply only to entries made after its passage. This is the view taken by the land department, and it is manifestly correct.<sup>2</sup>

**§ 175. Effect of patents issued for lands within townsites.—**It is difficult to intelligently discuss the force and effect of patents for any particular class of lands without involving the consideration of the general principles of law applicable to all land patents issued by the government. We appreciate the fact that at some place in this treatise the full consideration of such general principles will be a necessity; but we doubt the propriety of doing so every

<sup>1</sup> We are aware that there are several cases arising under the law as it existed prior to March 3, 1891, which, in discussing mining patents within townsites, seem to lay some stress upon the failure of the townsite claimant to adverse the mineral applicant. But, as we understand the cases, such ruling was not necessary for the purpose of the case under consideration. We shall discuss this question further when dealing with the subject of adverse claims.

<sup>2</sup> *Plymouth Lode*, 12 L. D. 513; *Protector Lode*, *Id.* 602; *Pacific Slope Lode*, *Id.* 696.

time we are called upon to deal with patents to an individual class. When we shall have passed that portion of the work dealing with the method of initiating and perfecting title to mineral lands, and have outlined the proceedings culminating in the issuance of the patent, we hope to present the subject fully. For the present, we are considering the question of patents for lands issued within townsites, a somewhat limited, though by no means unimportant, class. In doing so it will be sufficient to simply epitomize what we understand to be the underlying principles controlling the courts in determining the operative force and effect of a federal patent.

We understand the general rules to be as follows:—

(1) A patent for land is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles, until set aside or annulled;<sup>1</sup>

(2) The land department is a tribunal appointed by congress to decide certain questions relating to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else;<sup>2</sup>

(3) The government having issued a patent, cannot by the authority of its own officers invalidate that patent by the issuing of a second one for the same property;<sup>3</sup>

(4) A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose

<sup>1</sup>Stone v. United States, 2 Wall. 525; Hooper v. Scheimer, 23 How. 235; Johnson v. Towsley, 13 Wall. 72; Gibson v. Chouteau, *Id.* 92; Warren v. Van Brunt, 19 Wall. 646; St. Louis Smelting Co. v. Kemp, 104 U. S. 636; Hoofnagle v. Anderson, 7 Wheat. 212.

<sup>2</sup>Lee v. Johnson, 116 U. S. 48; Johnson v. Towsley, 13 Wall. 72; Warren v. Van Brunt, 19 Wall. 646; Shepley v. Cowan, 91 U. S. 330; Moore v. Robbins, 96 U. S. 530; Marquez v. Frisbie, 101 U. S. 473; Vance v. Burbank, *Id.* 514; Quinby v. Conlan, 104 U. S. 420; St. Louis Smelting Co. v. Kemp, *Id.* 636; Steel v. St. Louis Smelting Co., 106 U. S. 447; Baldwin v. Starks, 107 U. S. 463; United States v. Minor, 114 U. S. 233; Davis v. Weibhold, 139 U. S. 507; Barden v. N. P. R. R., 154 U. S. 288.

<sup>3</sup>Iron S. M. Co. v. Campbell, 135 U. S. 286; Davis v. Weibhold, 139 U. S. 507.

of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others.<sup>1</sup>

Applying these principles to the class of patents under consideration, we are justified in deducing the following —

(A) A mining patent issued prior to the final entry of a townsite is conclusive evidence that all antecedent steps necessary to its issue have been properly and legally taken,<sup>2</sup> and necessarily inhibits the issuance of a subsequent patent to the townsite claimants covering the same property. In cases of incorporated cities and towns, under the present state of the law granting certain surface privileges to prior occupants of the surface of lode claims, we think the law gives this prior occupant the status of an adverse claimant, and that, to protect his rights to the surface, he must file his adverse claim and pursue his remedy in the courts. Failing in this, the patent issued will be a conclusive adjudication that no such prior occupancy existed. We might go a step farther, and assert that a general reservation in a patent of surface rights would not protect the prior occupant or enable him to collaterally assail the mineral patent. The fact and extent of his occupancy should be definitely determined when the mineral patent is issued, and the boundaries and extent inserted in a special reserving clause. This would enable the government to subsequently patent the surface under a townsite application, and the two patents, when taken together, would clearly show jurisdiction in the land department to issue both. The thing reserved by one would be granted by the other.<sup>3</sup>

<sup>1</sup> *Wright v. Roseberry*, 121 U. S. 488; *Davis v. Webbald*, 139 U. S. 507; *Hardin v. Jordan*, 140 U. S. 371; *United States v. Winona & St. P. R. R.*, 67 Fed. 948.

<sup>2</sup> *Davis v. Webbald*, 139 U. S. 507; *Iron S. M. Co. v. Campbell*, 29 Pac. 513; *Kahn v. Old Tel. Co.*, 2 Utah, 174; *Chambers v. Jones*, 42 Pac. 758; *Poiré v. Wells*, 6 Colo. 406; *Justice M. Co. v. Lee*, 40 Pac. 444; *United States v. Iron S. M. Co.*, 128 U. S. 673; *Mont. Cent. Ry. v. Milgeon*, 68 Fed. 811.

<sup>3</sup> *Iron S. M. Co. v. Campbell*, 135 U. S. 286-292.

That the government, as the paramount proprietor, can create such a severance of title, cannot be denied. It was of frequent occurrence under the common law.<sup>1</sup> And the right of a private owner to separate the ownership of the minerals from that of the overlying surface has always been recognized in America.<sup>2</sup>

The surface proprietor, as an incident to his grant, would, of course, be entitled to the right of subjacent support; and the mineral patentee would be compelled to so conduct mining operations underneath the surface as not to interfere with the full enjoyment of the surface and the buildings and improvements thereon.<sup>3</sup>

(B) When a townsite patent is issued, it is in law such a declaration of the patentability of the land under the townsite laws that no subsequent discovery of minerals can deprive the townsite owner of his property. The patent to the townsite effectually withdraws the land from the body of the public domain, and it is no longer subject to exploration and purchase under the mining laws, based upon discoveries subsequent to the townsite patent.<sup>4</sup>

(c) In the case of patents to incorporated cities or towns issued under the act of March 3, 1891, the patent is no longer conclusive evidence of the fact that the lands are non-mineral, as the department is no longer called upon to determine the character of the land, unless it be to segregate the known veins, or lodes, and determine upon proper proceedings in that behalf the fact of the existence of such veins, or lodes, or of valid subsisting mining claims, and segregating them from the other lands subject to entry under the townsite, that patents may issue ultimately to

<sup>1</sup> See, *ante*, § 9.

<sup>2</sup> *Hartwell v. Camman*, 2 Stockt. Ch. 128; *Stewart v. Chadwick*, 8 Iowa, 463; *Caldwell v. Fulton*, 31 Pa. St. 475; *Arnold v. Stevens*, 24 Pick. 106; *Johnstown I. Co. v. Cambria I. Co.*, 32 Pa. St. 241; *Knight v. Indiana C. & I. Co.*, 47 Ind. 105, 110; *Marble Co. v. Ripley*, 10 Wall. 393; *Riddle v. Brown*, 56 Am. Dec. 202; *French v. Brewer*, 3 Wall. Jr. 346.

<sup>3</sup> 6 *Lawson's Rights and Remedies*, § 2787, p. 4544, and cases there cited.

<sup>4</sup> *Davis v. Wiebbold*, 139 U. S. 507; *McCormick v. Sutton*, 97 Cal. 373; *Smith v. Hill*, 89 Cal. 122; *Carter v. Thompson*, 65 Fed. 329.

the mineral claimant, as contemplated in the act. We doubt the propriety of inserting general clauses of reservation. The two patents when issued should show that the property granted by the junior patent is identically that which is reserved out of the senior patent. A reservation of a specific boundary, laid down so as to be identified in the first patent, needs no judicial action to determine what it is that is reserved.<sup>1</sup>

§ 176. **What constitutes a mine or valid mining claim within the meaning of section twenty-three hundred and ninety-two of the Revised Statutes.**—Section twenty-three hundred and ninety-two of the Revised Statutes provides that no title can be acquired under the townsite laws to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession under existing laws.

What is meant by the term "mine," as used in this section?

We have heretofore had occasion to discuss the meaning of the word "mine" in its etymological sense, and have shown that the word is not a definite term, but is susceptible of limitation, according to the intention with which it is used. We have also traced what we have called the evolution of denotation, showing the gradual extension of the meaning from an underground excavation made for the purpose of getting minerals to its use as an equivalent for "vein," "seam," or "lode."<sup>2</sup>

Construing the word as we find it in the context, and considering those portions of the Revised Statutes *in pari materia*, we think it clear that "mine" is used in its enlarged sense, and is synonymous with "vein," or "lode."

A valid mining claim can only be based upon a discovery within the limits of the claim, and the existence of mineral in such quantities as to render the land more valuable for mining than for any other purpose, or as will

<sup>1</sup> *Iron S. M. Co. v. Campbell*, 135 U. S. 280, 292.

<sup>2</sup> See, *ante*, §§ 88, 89.

justify a prudent man in the expenditure of time and money in its exploitation and development.<sup>1</sup>

The character of the land being thus established, its proper location, marking of boundaries, and compliance with the local laws, if any such exist, is necessary to perfect a valid mining claim.

In order to exempt such veins, lodes, or claims from the operation of a townsite patent, they must at the time of its issuance be *known* to be valuable for their minerals. To use the language of the supreme court of the United States:—

“ We say ‘ land *known* at the time of the sale to be valuable for its minerals,’ as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. . . . We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which years afterwards rich deposits of mineral may be discovered.”<sup>2</sup>

“ It is established by former decisions of this court that under the acts of congress which govern this case, in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the townsite patents take effect, but that they must at that time be known to contain minerals to such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable or are afterwards discovered to be still valuable for such purposes does not defeat or impair the title of persons claiming under the townsite patent.”<sup>3</sup>

The case from which the last quotation is made was taken to the supreme court of the United States on writ of error to the supreme court of California.

<sup>1</sup> See, *ante*, § 98.

<sup>2</sup> Deffeback v. Hawke, 115 U. S. 392, 404.

<sup>3</sup> Dower v. Richards, 151 U. S. 658, 663, (citing, Deffeback v. Hawke, 115 U. S. 392; Davis v. Weilbold, 139 U. S. 507).



It appears from the facts in this case that the defendant, Dower, claimed that the portion of the lot which was in his possession was not granted by the patent, being reserved or excepted out of its operation, by reason of the fact that it contained a gold-bearing quartz vein, the existence of which was known at and before the date of the patent. The defendant did not claim under a location made prior to the patent to the townsite, but his asserted rights accrued under a location made subsequent to the issuance of such patent. It appeared that at one time during the history of the town, but prior to the patent, the lode in question was successfully and profitably worked, but that it had been abandoned, and work thereon had ceased for a number of years before the location of the defendant. Upon this state of facts the supreme court of the state of California thus announced its views:—

"Assuming, then, that at the date of the issuance of the townsite patent that part of the Wagner ledge embraced in these lots was regarded as worked out and as of no further value for mining purposes, we find that the predecessors of plaintiffs purchased the lots from the patentee, went into possession of them, fenced them, divided them into different inclosures, built valuable houses and outhouses upon them, planted them with fruit-trees, filled up the old mining excavations, and, in short, devoted them to the purposes of a home

"After fifteen years, and more, during which there was a complete cessation of mining on the lode, the defendants entered upon the possession of the plaintiffs, made a location of the ledge, claiming three hundred feet of surface on each side of the croppings,—a strip of six hundred feet in width across plaintiffs' lots,—and proceeded to dig up their garden and orchard, demolish their fences, and undermine their houses.

"All this the defendants justify upon the ground that the ledge and adjacent surface which they have located was reserved by the United States out of the land patented to the townsite trustee. It remains to consider whether they are correct in their construction of the law upon this point. . . .

"The question, then, is reduced to this: What was a mine of gold within the meaning of the act of 1867?

“ Without the aid of any judicial or legislative construction, we should say, without hesitation, that one essential requisite of a gold mine would be a natural deposit of rock or earth containing a sufficient quantity of gold to admit of profitable working. If lands are known to contain precious metals, but in quantities so small as not to justify the attempt to extract them, they are not properly called mineral lands; and even if they might be mined at a very small profit, but are clearly of more value for agriculture than for mining, they are agricultural rather than mineral lands.”<sup>1</sup>

In a later case a similar rule was declared by the same court: —

“ The term ‘ mine of gold, silver, cinnabar, or copper,’ as used in the exception found in the act, and in the reservation of the patent, means a paying mine known to exist at the time of the grant to the county judge, or one which there was good reason to believe then existed.”<sup>2</sup>

The supreme court of the United States announced similar doctrines in reference to “ known mines,” as that term was used in the pre-emption act of 1841,<sup>3</sup> and with reference to lodes within patented placers known to exist at the time of the application for patent, and which are unclaimed by the applicant.<sup>4</sup>

Following the construction given to placer patents reserving lodes known to exist prior to the filing of the placer application and not claimed by the applicant, it would seem that where a location of a vein, or lode, of mineral or other deposits has, prior to the issuance of a townsite patent, been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location has been recorded in the usual books of record, that vein is such a “ mine ” as is, under the terms of the law, reserved from the operation of the townsite patent, although personal knowledge

<sup>1</sup> Richards v. Dower, 81 Cal. 44, 49.

<sup>2</sup> Smith v. Hill, 89 Cal. 122, 125.

<sup>3</sup> Colo. C. & I. Co. v. United States, 123 U. S. 307, 328.

<sup>4</sup> United States v. Iron S. M. Co., 128 U. S. 673-683; Iron S. M. Co. v. Mike & Starr Co., 143 U. S. 394-404.

of its existence may not be possessed by the applicant for patent. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the placer applicant with the existence of the vein or lode.<sup>1</sup>

If it were a valid perfected lode claim, it would be embraced within the last clause of section twenty-three hundred and ninety-two of the Revised Statutes, and there is no necessity to resort to the rule in the case of lodes within placers for analogy.

But where there is no location embracing it, the vein, or lode, or "mine," if falling within the designation as heretofore defined, is just as much excepted from the operation of the townsite patent as if it were a located lode.

If it is such a known vein, it may be located at any time. This is the rule applied by the supreme court of the United States in the case of known lodes within patented placers;<sup>2</sup> and we cannot see why a similar rule should not apply to known mines or veins within townsite patents.

As to the valid mining claim which is reserved from the operation of the townsite patent, it must necessarily have been located with all the formalities required by law, and be subsisting at the time the townsite patent takes effect. If the location were for any reason invalid at that time, an amended location, made subsequent to the issuance of the townsite patent, would not relate back to the original invalid location.

A case of this character was considered by the supreme court of Arizona, which court thus states its views:—

"A location of a mining claim, to fix the title as against after-acquired rights by entry and patent, should be sufficiently clear to designate the ground claimed, and should be marked on the ground by monuments, showing the extent of possession. If the location on its face be uncertain, the uncertainty could be aided by evidence of the possession, or of monuments; but a location notice, on its face uncertain and without evidence of what land was

<sup>1</sup> *Noyes v. Mantle*, 127 U. S. 348.

<sup>2</sup> *Iron S. M. Co. v. Mike & Starr Co.*, 143 U. S. 194.

“occupied, cannot be evidence for any purpose. An amendment, afterwards made, describing different land or making certain what was uncertain, cannot revert back to the original defective location. The entry of the townsite intervening after the first location and before the amendment, must be prior in right, as it is prior in time.”<sup>1</sup>

§ 177. **In what manner may a townsite patent be assailed by the owner of a mine or mining claim.**—Where a mine or valid mining claim exists within the patented townsite at the time the patent is issued—or, to be more exact, at the time final entry thereof is made, and certificate of purchase is issued,—such mine or claim does not pass by the patent; and it seems from the current of authority that the claimant or owner of such a mine or claim may defend in actions at law against the townsite title by showing the fact of the existence of such mine or claim.

As was said by the supreme court of Montana, in the Smokehouse Lode cases,—

“An exception in a townsite patent, excluding from its operation all mines, mining claims, and possessions held under existing laws, is an exception required by the law, and is made by the law itself, and is conclusive upon the question that the government did not, and did not intend, by such townsite patent to convey any valid mine or mining claim or possession held under existing laws; and it is therefore impossible, under a patent to a townsite, to acquire any interest in any valid mine or mining claim, or in the surface thereof. . . . A valid location of a quartz lode mining claim on the public mineral lands of the United States is a grant from the government to the locator thereof, and carries with it the right, by a compliance with the law, of obtaining a full and complete title to all the lands included within the boundaries of the claim, which by the location are withdrawn from sale or preemption; and the patent, when issued, relates back to the location, and is not a distinct grant, but the consummation of the grant which had its inception in the location of the claim.”<sup>2</sup>

<sup>1</sup> Tombstone Townsite Cases, 15 Pac. 26.

<sup>2</sup> Butte City Smokehouse Lode Cases, 6 Mont. 397, 401.

The same court, in a previous case, thus states its views:—

"If, then, the location of a mining claim has the effect of a grant by the United States to the locator of the right to the present and exclusive possession of the ground located, it follows that there could not be a like grant of the same property to any other person. There would be no room for a further grant; for the government would have nothing further to convey. After such a grant, which also carries with it the right to purchase the absolute title, the land described within the grant ceases to be public land, and the pre-emption laws, and laws providing for the sale and purchase of the public domain, have no application to it or effect upon it. It is just as much withdrawn from the public domain as the fee is by a valid grant from the United States under authority, or the possession by a valid and subsisting homestead or pre-emption entry. It is already sold, and becomes private property, which may be disposed of at the will of the owner. And so land thus sold and disposed of is not affected one way or another by the subsequent acts of congress providing for the entry of townsites upon the public lands. The application and entry for townsites is only authorized on the public lands, and after the lands have been granted and sold, as in the case of a valid mining location and claim, the entry of a townsite does not affect such claim, though situate within the boundaries of the townsite. The reason is that the mining claim and ground has already been granted and sold, and has thereby ceased to be a portion of the public lands, for which only the townsite entry could be made; and, for a further reason, the townsite act expressly provides that no title shall be acquired under the provisions of said act, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession under existing laws. If no title can be acquired to a mining claim or possession by virtue of the townsite act, then the defendants herein, who claim by virtue of a subsequent townsite entry and patent, cannot disturb the exclusive possession of the plaintiff, who claims by virtue of a prior valid location and patent of the mining claim in question."<sup>1</sup>

To the same purport is the case of *Talbot v. King*, decided by the same court.<sup>2</sup>

<sup>1</sup>*Silver Bow M. & M. Co. v. Clark*, 5 Mont. 378, 415.    <sup>2</sup>6 Mont. 76.

These Montana cases were not appealed to the supreme court of the United States, but were referred to by that tribunal in the case of *Davis v. Weibbold*; <sup>1</sup> and the language then used would seem to imply a sanction to the doctrine announced by the supreme court of Montana.<sup>2</sup>

The force of this rule has been recognized in a recent case by the court of appeals of Colorado, although the question there raised in this respect was merely collateral to the main issue. This court, speaking through Presiding Judge Reed, says:—

“The first contention of appellant is that the court  
“erred in refusing to allow the plaintiff to prove that the  
“discovery of the ‘Lady B’ was within the patented limits  
“of the town of Blackhawk. All the evidence shows that  
“the existence of a mineral-bearing vein at the place the  
“discoveries were made was known long previous to the  
“application for a receipt of the title by the town. That  
“under the statute was sufficient. The town took no title.”<sup>3</sup>

This rule is necessarily based upon the theory that the land department had no jurisdiction to convey to the townsite that which had already been withdrawn from the public domain by appropriation under the mining laws. The results reached seem illogical. With the exception of the case of incorporated cities and towns, townsite entries can not be permitted upon mineral lands. The patent when issued is entitled to the presumption that the lands are non-mineral. As the supreme court of the United States has said, the presumption in favor of the validity of a patent is so potential and efficacious that it has been frequently held by the supreme court of the United States that if under any circumstances in the case the patent might have been rightfully issued, it will be presumed on collateral attack that such circumstances existed.<sup>4</sup>

<sup>1</sup> 139 U. S. 530.

<sup>2</sup> *King v. Thomas*, 6 Mont. 409. See, also, decision of Judge De Witt in *Chambers v. Jones*, 42 Pac. 758; *Tombstone Townsite Cases*, 15 Pac. 26; *Blackmore v. Reilly*, 17 Pac. 72.

<sup>3</sup> *Moyle v. Bullene*, 44 Pac. 69, 71.

<sup>4</sup> *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 646. See, also, dissenting opinion in *Iron S. M. Co. v. Mike & Starr Co.*, 143 U. S. 394, 407.



If there existed at the time of the townsite entry a mine or valid mining claim within the limits of the town, it necessarily follows that some of the lands, at least, were mineral, and the patent was to such extent wrongfully issued. If it is necessary to determine the fact of the existence or non-existence of mineral in paying quantities within the limits of a townsite before patent could issue, why is the patent not a judgment that it is non-mineral,—therefore, that no mine or valid mining claim exists?

The question seems to us uncomfortably close.

The difficulties of the situation were appreciated by the supreme court of the United States in a case involving a claimed known lode within a prior placer patent to which the placer applicant asserted no right at the time of filing his application, a junior patent to the lode claimant having been issued. The supreme court thus announced its views:—

“ We are not ignorant of the many decisions by which  
“ it has been held that the rulings of the land officers in  
“ regard to the facts on which patents for lands are issued  
“ are decisive in actions at law, and that such patents can  
“ only be impeached in regard to those facts by a suit in  
“ chancery, brought to set the grant aside. But these are  
“ cases in which no prior patent had been issued for the  
“ same land, and where the party contesting the patent had  
“ no evidence of a superior legal title, but was compelled to  
“ rely on the equity growing out of frauds and mistakes in  
“ issuing the patent to his opponent.

“ Where each party has a patent from the government,  
“ and the question is as to the superiority of the title under  
“ those patents, if this depends upon extrinsic facts not  
“ shown by the patents themselves, we think it is competent  
“ in any judicial proceeding where this question of superiority of title arises to establish it by proof of these facts.  
“ We do not believe that the government of the United States, having issued a patent, can, by the authority of its own officers, invalidate that patent by the issuance of a second one for the same ground.”<sup>1</sup>

From the doctrine as announced by the majority court in this case, the chief justice and Justice Brewer dissented.

<sup>1</sup> *Iron S. M. Co. v. Campbell*, 135 U. S. 286, 292.



Justice Brewer, speaking for the minority of the court, said:—

“ From *Johnson v. Towsley* (13 Wall. 72) to the present time, the uniform ruling of this court has been that questions of fact passed upon by the land department are conclusively determined, and that only questions of law can be brought into court. The right to this patent depends solely upon these two questions of fact, which were considered by the land office when the original patent was issued. I think that its determination was conclusive.”

In a later case before the same tribunal,<sup>1</sup> the lode claimant had no patent, but rested his case upon a location made after the final entry of the placer claim, but upon a lode which, it was claimed, was known to exist at the time of the application for the placer patent, and which was not included in the application. The right to establish these facts by extrinsic evidence, and thus to limit the operation of the placer patent, was upheld by the majority of the court. The minority of the court, speaking through Justice Field, thus presented its views:—

“ I am unable to agree with my associates in the disposal of this case. The decision and the opinion upon which it is founded will do much, in my judgment, to weaken the security of patents of the United States for mineral lands, and leave them open to attack and overthrow upon mere surmises, notions, and loose gossip of the neighborhood, which ought not to interfere with any rights of property resting upon the solemn record of the government.”

In *Dahl v. Raunheim*,<sup>2</sup> Judge Field, speaking for the entire court, in a case of the same class, says:—

“ That it was *placer* ground is conclusively established in this controversy against the defendant by the fact no adverse claim was asserted by him to the plaintiff's application for patent of the premises as such ground. That question is not now open to litigation by private parties seeking to avoid the effect of plaintiff's proceedings.”

<sup>1</sup> *Iron S. M. Co. v. Mike & Starr Co.*, 143 U. S. 394, 407.

<sup>2</sup> 132 U. S. 260, 263.

In perfecting mining locations the government is not an actor. It assures to the explorer the right to his mining location, but it does not surrender the right to determine for itself the qualifications of the locator, the fact of his discovery, his compliance with the law, and the character of the land. A judgment by a court of competent jurisdiction in proceedings brought upon adverse claims does not conclude the government as to these matters. There is no notice brought to the attention of the government of the existence of mining locations or known lodes prior to the application for patent. The only record made is with an officer who has no connection with the land department, and who owes no responsibility to the government. And yet a townsite patent issued by the government may be assailed in an action between individuals, and its operation defeated by showing facts the existence of which the government neither actually nor constructively could have any knowledge, unless it was a part of its duty to ascertain them when the townsite patent was applied for; and if it was a part of its duty, the patent should be conclusive evidence that that duty was performed. To say that a perfected mining claim is a grant from the government, is true in one sense, but it does not follow that in establishing the existence of such a grant the government has no voice. It is not a grant in the sense that the government has absolutely parted with its title. It does not seem right that where only one patent is issued, and where the government has not attempted to issue a second one covering any portion of the premises described in the first, that the operative effect of the prior patent should be limited by judgments in actions to which the government is in no sense a party. It would seem that the remedy in such cases should be by action instituted by the government to vacate the patent, after notice of the facts brought to its attention.

But that the law as applied to the particular class of cases under consideration is different, we cannot, in the light of the adjudicated cases, deny.

While instances are found in the books of the issuance by the land department of a prior patent to a townsite and a subsequent one to the mineral claimant, that department in later years has taken the position that its jurisdiction is exhausted by the issuance of the prior patent, and until that is set aside it is not authorized to issue the junior mineral patent within the limits of the townsite.<sup>1</sup>

If the lode or mining claim is by operation of law reserved out of the patent, it certainly follows that the department may subsequently issue a patent for the thing so reserved. This is the rule now followed by the department with reference to lodes known to exist within patented placers;<sup>2</sup> and we cannot see, in the the light of the law as expounded by the courts, why the same doctrine should not apply to lodes or claims existing at the date of the townsite entry within the townsite limits.

## ARTICLE VI. INDIAN RESERVATIONS.

§ 181. Nature of Indian title.

§ 182. Manner of creating and abolishing Indian reservations.

§ 183. Lands within Indian reservations are not open to settlement or purchase under the public land laws.

§ 184. Status of mining claims located within limits of an Indian reservation prior to the extinguishment of the Indian title.

§ 185. Effect of creating an Indian reservation embracing prior valid and subsisting mining claims.

§ 186. Conclusions.

**§ 181. Nature of Indian title.**— The scope of this treatise neither calls for nor permits elaborate discussion of the legal or ethical relationship existing between the government of the United States and the “wards of the nation,” as the Indian tribes within our borders are popularly styled.

<sup>1</sup> See, *ante*, § 173, p. 212; Pacific Slope Lode, 12 L. D. 686; Cameron Lode, 13 L. D. 369; Protector Lode, 12 L. D. 662; Plymouth Lode, *Id.* 513.

<sup>2</sup> South Star Lode, 20 L. D. 204 (on review); Butte & Boston M. Co., 21 L. D. 125, reversing Pike's Peak Lode, 14 L. D. 47, and Com'rs' decision, South Star Lode, 17 L. D. 280.

The government legislates upon the conduct of strangers or citizens within the limits of their reservation, and for many years innumerable treaties formed with them acknowledged them to be independent people.<sup>1</sup>

But by the act of congress passed March 3, 1871,<sup>2</sup> it was declared that no Indian nation or tribe within the territory of the United States should thereafter be recognized as an independent nation, tribe, or power with whom the United States might contract by treaty.<sup>3</sup>

It was determined in the early history of our country that the absolute, ultimate title to lands in the possession of the Indians was acquired by the discoverers of the country, subject only to the Indian title of occupancy, and that the discoverers possessed the exclusive right of acquiring this title; or, in other words, the exclusive right of pre-emption. As was said by Chief Justice Marshall,—

"It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of the government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."<sup>4</sup>

Indians have a right to the lands they occupy until that right is extinguished by voluntary cession to the government.<sup>5</sup> But they are mere occupants; they do not hold a fee in the land of their original occupation, but only a usufruct, the fee being in the United States, if within the public land states or territories, or in some of the several states, if the national government acquired no lands therein.<sup>6</sup>

<sup>1</sup> *Fletcher v. Peck*, 6 Cranch, 87, 147.

<sup>2</sup> 16 Stats. at Large, 566.

<sup>3</sup> *Public Domain*, 244.

<sup>4</sup> *Johnson & Graham's Lessees v. McIntosh*, 8 Wheat. 543, 603.

<sup>5</sup> *Cherokee Nation v. Georgia*, 5 Peters, 1; *Godfrey v. Beardsley*, 2 McLean, 412; *Holden & Warner v. Joy*, 17 Wall. 211.

<sup>6</sup> *United States v. Cook*, 19 Wall. 591; *Marsh v. Brooks*, 8 How. 223; *Mann v. Wilson*, 23 How. 457; *Minter v. Crommelin*, 18 How. 87; *Beecher v. Wetherby*, 95 U. S. 517; *Worcester v. State of Georgia*, 6 Peters, 515; *United States v. Cook*, 86 U. S. 591.

Lands conveyed by the government to an Indian nation in lieu of original territory surrendered by them under treaties, for the purpose of inducing a change of habitat, are alike subject to the preferred right of the government to extinguish or acquire the Indian title.

**§ 182. Manner of creating and abolishing Indian reservations.**—Mr. Donaldson thus explains the manner of creating and abolishing Indian reservations:—

“The method of making an Indian reservation is by an executive order withdrawing certain lands from sale or entry and setting them apart for the use and occupancy of the Indians, such reservation previously having been selected by officers acting under the direction of the commissioner of Indian affairs or that of the secretary of the interior, and recommended by the secretary of the interior to the president. The executive order is sent to the office of Indian affairs, and copy thereof is furnished by that office to the general land office, upon receipt of which the reservation is noted upon the land-office records, and local land officers are furnished with a copy of the order, and are directed to protect the reservation from interference.

“When such reservation is no longer required, and the president is so informed by the secretary of the interior, an executive order is issued restoring the lands to the public domain, and the order being received by the commissioner of Indian affairs, a copy thereof is furnished to the general land office, where it is noted, and information is communicated to the United States land officers, after which the lands are disposed of as other public lands.”<sup>1</sup>

Indian reservations existing by virtue of treaty stipulations are usually abolished, and the Indian title extinguished by compact between chiefs of the tribes and agents of the government, the agreement being subject to approval by congress and the president.<sup>2</sup>

**§ 183. Lands within Indian reservations are not open to settlement or purchase under the public land laws.**—It has been the policy of the government from the begin-

<sup>1</sup> Public Domain, 243.

<sup>2</sup> *Id.* 244.

ning to prohibit the settlement of lands in the occupation of the Indians.<sup>1</sup>

As was said by the supreme court of the United States,—

“That lands dedicated to the use of the Indians should “upon every principle of natural right be carefully guarded “by the government and saved from a possible grant, is a “proposition which will command universal assent.”<sup>2</sup>

While the government may dispose of the fee of the land, it remains burdened with the right of occupancy in the Indians.<sup>3</sup> This right of occupancy can not be interfered with nor determined, except by the United States. No private individual can invade it, and the manner, time, and conditions of its extinguishment are matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals.<sup>4</sup> Where land is reserved for the use of an Indian tribe by treaty, the treaty is notice that the land will be retained for the use of the Indians, and this purpose can not be defeated by the action of any officers of the land department.<sup>5</sup> The lands embraced therein are no longer public lands.<sup>6</sup>

The nature of this use requires the absolute reservation and withdrawal of every foot of land within the defined limits, and no portion of it is disposable to settlers or to purchasers so as to enable them to invade the Indian occupancy. In this respect Indian reservations differ from that class of Mexican grants called “floats,” within the exterior boundaries of which the government may grant lands to others than the claimants, so long as sufficient land remains to satisfy the grant.<sup>7</sup>

In most of the compacts entered into between the

<sup>1</sup> Hot Springs Cases, *Rector & Hale v. United States*, 92 U. S. 698.

<sup>2</sup> *Leavenworth L. & G. R. Co. v. United States*, 92 U. S. 733, *Missouri, K. & T. Ry. Co. v. United States*, *Id.* 760.

<sup>3</sup> *Beecher v. Whetherby*, 95 U. S. 517; *Buttz v. N. P. R. R.*, 119 U. S. 55.

<sup>4</sup> *Id.*

<sup>5</sup> *United States v. Carpenter*, 111 U. S. 347.

<sup>6</sup> *Missouri, K. & T. Ry. Co. v. Roberts*, 152 U. S. 114; *Spalding v. Chandler*, 160 U. S. 384, 405.

<sup>7</sup> *United States v. McLaughlin*, 127 U. S. 428; *Carr v. Quigley*, 149 U. S. 652. See, *ante*, § 124.

government and Indian tribes, the United States has agreed that only such persons as were specified in the treaty should ever be permitted to pass over, settle upon, or reside in the territory so set apart for the use of the Indians. The treaty with the Sioux Indians, proclaimed February 24, 1869, embracing within its limits the famous Black Hills, in Dakota, and with the confederated band of Ute Indians, in Colorado, contained these stipulations.<sup>1</sup>

But in the absence of such specific stipulations, the policy of the government has been to preserve the reservation from invasion by those seeking to establish settlement within the boundaries.

**§ 184. Status of mining claims located within limits of an Indian reservation prior to the extinguishment of the Indian title.**—It logically follows from the nature and object of a reservation of land for the use and occupancy of the Indians that no rights can be lawfully initiated to mineral lands within the limits of such reservation. It would be a violation of public faith to permit these lands, so long as the Indian title remains unextinguished, to be invaded with a view to their exploration and appropriation for mining purposes. Such invasion, although peaceful in its inception, would invariably end in conflicts. The government could not lend its sanction to such intrusion without being charged with a violation of its solemn obligations.<sup>2</sup>

The supreme court of Colorado, in a case which involved a mining claim within the limits of what was at the time of its discovery and location the Ute Indian reservation in that state, clearly announced the rule:—

“ The effect of the treaty was to withdraw the whole of  
“ the land embraced within the reservation from private  
“ entry or appropriation, and during its existence the gov-  
“ ernment could not have authorized the plaintiffs to enter  
“ upon the ground in controversy for the purpose of dis-

<sup>1</sup> Uhlig v. Garrison, 2 Dak. 71-95; Kendall v. San Juan S. M. Co. 9 Colo. 349.

<sup>2</sup> See the interesting account of the settlement of Deadwood and the Black Hills region, in 8 Copp's L. O. 153.



" covering and locating a mining claim. On the contrary, " the government stood pledged to prevent its citizens from " entering upon the reservation for any such purposes. " The right to locate mineral lands of the United States is " declared to be a privilege granted by congress. No such " grant including the premises in controversy existed at " the time of the plaintiff's location. It is also held that " a location to be effective must be good at the time it was " made, and that it can not be good when made if there is " then an outstanding grant of the exclusive right of pos- " session to another. The possession of the plaintiffs at " the time of their location of the Bear lode was tortious. " Such being the character of their possession, and assum- " ing to locate a claim, not only *without legal* authority, but " in violation of law, the attempted location was a nullity. " It was just as if it had never been made."<sup>1</sup>

The supreme court of the United States affirmed the rule thus announced. Said that court:—

" The effect of the treaty was to exclude all intrusion " for mining or other private pursuits upon the territory " thus reserved for the Indians. It prohibited any entry " of the kind upon the premises, and no interest could be " claimed or enforced in disregard of this provision. Not " until the withdrawal of the land from this reservation of " the treaty by a new convention with the Indians, and " one which would throw the lands open, could a mining " location therein be initiated by the plaintiffs. The loca- " tion of the Bear lode, having been made whilst the treaty " was in force, was inoperative to confer any rights upon " the plaintiffs."<sup>2</sup>

The supreme court of Dakota set its seal of condemna- tion upon the attempted assertion of rights to occupy lands within the Black Hills region prior to the extinguishment of the title of the Sioux Indians;<sup>3</sup> and with reference to attempted mining locations it established the rule that a party can not acquire a mining claim by acts performed within an Indian reservation. But it was also held that a party in possession on the day the Indian title became

<sup>1</sup> *Kendall v. San Juan S. M. Co.*, 9 Colo. 349, 357 citing *United States v. Carpenter*, 111 U. S. 347; *Belk v. Meagher*, 104 U. S. 279).

<sup>2</sup> *Kendall v. San Juan S. M. Co.*, 144 U. S. 658, 663.

<sup>3</sup> *Uhlig v. Garrison*, 2 Dak. 71, 95.

extinguished, with the requisite discovery, with surface boundaries marked and notice posted, could adopt these antecedent steps, and manifest their adoption by then recording his notice of location in the proper office, and by so doing and performing the amount of labor and making improvements could date his rights from that day;<sup>1</sup> and this doctrine also met with the approval of the supreme court of the United States.<sup>2</sup>

The general rule with reference to mining claims within Indian reservations was first announced by the supreme court of Dakota in the case of *French v. Lancaster*;<sup>3</sup> but no written opinion was filed. In this case it seems that both parties litigant, being rival mineral claimants *in pari delictu*, stipulated to waive all objections that might have been raised to evidence of acts of location and appropriation performed prior to the extinguishment of the Indian title. The trial court acted upon the stipulation, and determined the case regardless of the existence of the reservation.<sup>4</sup>

The appellate court, however, held that public policy required that notice should be taken of the facts, and held the attempted locations invalid.

The general doctrine announced in this case was followed by the same court in a later case.<sup>5</sup>

The land department has uniformly adhered to the doctrine that the occupancy and location of mining claims within an Indian reservation prior to the extinguishment of the Indian title is an open violation of solemn treaty obligations, and without even a shadow of right.<sup>6</sup>

Manifestly, the precise time when the Indian title becomes effectually extinguished, and the reserved lands

<sup>1</sup> *Caledonia G. M. Co. v. Noonan*, 3 Dak. 189.

<sup>2</sup> *Noonan v. Caledonia G. M. Co.*, 121 U. S. 393.

<sup>3</sup> 2 Dak. 346.

<sup>4</sup> See *Golden Terra M. Co. v. Mahler*, 4 Morr. Min. Rep. 390, 405.

<sup>5</sup> *Golden Terra M. Co. v. Smith*, 2 Dak. 374, 462.

<sup>6</sup> *Townsite of Deadwood v. Mineral Claimants*, 8 Copp's L. O. 153; *Rattlesnake Jack Placer*, 10 Copp's L. O. 87; *Crow Indian Reservation*, Copp's Min. Lands, 236; *Circ. Instructions*, 3 L. D. 371; 6 L. D. 341.

In a recent case decided by Judge Hanford, sitting as circuit judge for the district of Washington, it was held in the case of the Colville

become open to entry and occupation for any purpose, depends upon the facts of each particular case<sup>1</sup>

**§ 185. Effect of creating an Indian reservation embracing prior valid and subsisting mining claims.** The land department, following the opinion of the attorney-general with reference to military reservations,<sup>2</sup> has held that mining claims valid and subsisting cannot be included within an Indian reservation set apart after the location of such claims so as to deprive the locator of his previously acquired rights. Where an Indian reservation has been made including such claim, the locators may show by proper proof, that their claims were valid and subsisting at the date of such reservation.<sup>3</sup>

Considering the dignity accorded to a mining title, perfected and acquired at a time when the lands were a part of the public domain, we think the ruling in harmony with the spirit and intent of the mining laws. Should the claim, however, become forfeited, after the reservation was created, it would not be open to relocation, but would become subject to the reservation. No new right could be initiated after the original right lapsed. The creation of the reservation would operate as an intervening obstacle, cutting off subsequent locations, as well as preventing the

Indian reservation that the act of congress opening a part of it *pro tanto* annulled the executive order creating the reservation and restored the lands to the public domain, subject only to the right of the Indians to make selection for allotments in severalty. For this purpose settlements upon and entries of agricultural lands must be postponed under the act until six months after the president's proclamation opening the lands; but prospectors and miners are not required to wait for the proclamation to open the tract to exploration for minerals, mineral lands not being subject to allotment to the Indians. (Colman v. Babb, 73 Fed. 735.)

By act of Feb. 20, 1896, the mineral land laws were extended to the north half of this reservation. (1st sess. 54th Cong., p. 9.)

<sup>1</sup> Congress has passed several special acts opening lands within Indian reservations to occupation, location, and purchase, under the provisions of the mineral laws only, with a preference right of purchase to those who had located prior to the opening of the reservation— for example, the Blackfeet, Fort Belknap, and San Carlos reservations. (1st sess. 54th Cong.)

<sup>2</sup> See, *post*, § 192.

<sup>3</sup> Chief Moses Indian Reservation, 9 Copp's L. O. 189.

restoration of the estate of the original locator by resumption of work.

§ 186. **Conclusions.**— We announce the following as our conclusions from the foregoing exposition of the law:—

No right to appropriate a mining claim within the limits of an Indian reservation can be initiated so long as the Indian title remains unextinguished. Acts which in the absence of such reservation might be valid may be adopted upon the extinguishment of the Indian title, if such adoption is manifested by perfection of the location and the performance of the required work or making improvements. Otherwise, the claim may be located by the first-comer, regardless of the acts done by others while the land was withdrawn from the public domain. A mining claim valid and subsisting at the time an Indian reservation is created is not affected by such reservation, nor are the rights of the prior locator impaired, so long as he perpetuates his estate by the performance of the requisite annual labor; but upon the abandonment or forfeiture of the claim, it becomes subject to the reservation; nor can the estate of the original locator be restored by resumption of work.

## ARTICLE VII. MILITARY RESERVATIONS.

§ 190. Manner of creating and abolishing military reservations.

§ 191. Status of mining claims located within the limits of a subsisting military reservation.

§ 192. Effect of creating a military reservation embracing prior valid and subsisting mining claims.

§ 190. **Manner of creating and abolishing military reservations.**— The method of creating military reservations is thus outlined by Mr. Donaldson:—

“ The commanding officer of a military department recommends the establishment of a reservation, with certain boundaries; the secretary of war refers the papers to the interior department, to know whether any objection exists

"to the declaration of the reserve by the president. If no objection is known to the general land office, and it is so reported, the reservation is declared by the president, upon application of the secretary of war for that purpose, and the papers are sent to the general land office, through the secretary of the interior, for annotation upon the proper records. If upon surveyed land, the United States land officers are at once instructed to withhold the same from disposal, and respect the reservation. If upon unsurveyed land, the United States surveyor-general is furnished with a full description of the tract, and is instructed to close the lines of public surveys upon the outboundaries of the reserve; the United States land officers are also instructed not to receive any filing of any kind for the reserved lands."<sup>1</sup>

The authority of the president, acting through the secretary of war and his officers, to have posts and forts established, with a proper quantity of ground appropriated for military purposes, is unquestioned.<sup>2</sup>

Such reservation is vacated, or "reduced," by executive proclamation.

Whenever in the opinion of the president of the United States the lands, or any portion of them, included within the limits of any military reservation have become useless for military purposes, he causes the same, or so much thereof as he shall designate, to be placed under the control of the secretary of the interior for disposition under the general laws relating to the public lands, and causes to be filed with the secretary of the interior a notice thereof.<sup>3</sup>

The lands thus restored are not always opened immediately for entry and settlement for agricultural purposes. Congress usually provides for their sale or extends the privilege of settlement upon them under the homestead laws. But with reference to mineral lands, the act of July 5, 1884,<sup>4</sup> in terms provides that whenever any lands

<sup>1</sup> Public Domain, 249.

<sup>2</sup> *Wilcox v. Jackson*, 13 Peters, 498; *Stone v. United States*, 2 Wall. 525; *Grisar v. McDowell*, 6 Wall. 381.

<sup>3</sup> Act of July 5, 1884, 23 Stats. at Large, 103. See, also, Act of Aug. 23, 1894, 28 Stats. at Large, 491; Act of Feb. 15, 1895, *Id.* 664.

<sup>4</sup> 23 Stats. at Large, 103.

containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of the act, the same shall be disposed of exclusively under the mineral land laws of the United States.

**§ 191. Status of mining claims located within the limits of a subsisting military reservation.**—Every tract set apart for some special use is reserved to the government, to enable it to enforce that use; and there is no difference in this respect whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting on the government to see that neither class of reservation is diverted from the uses to which it was assigned.<sup>1</sup>

Much that has been said in the preceding articles with reference to Indian reservations applies with equal force to military reservations. In an opinion given by Attorney-General McVeagh to the secretary of war, that officer was advised that mineral lands might be included in reservations for military purposes, and they are not subject to appropriation by mineral claimants while such reservation exists.<sup>2</sup> And this is the rule recognized by the land department.<sup>3</sup>

The law is too well settled to require discussion, that no right exists under any of the public land laws to invade the limits of a subsisting reservation for the purpose of initiating a title to the lands therein.

The creation of the reservation is a withdrawal of the lands from the operation of the public land laws; and so long as such reservation remains in force, no entry thereon can be lawfully made under the mining or other public land laws.

**§ 192. Effect of creating a military reservation embracing prior valid and subsisting mining claims.**—Mr. Armstrong, while acting commissioner of the general land

<sup>1</sup> *Leavenworth L. & G. R. Co. v. United States*, 92 U. S. 733.

<sup>2</sup> *Fort Maginnis*, 1 L. D. 552.

<sup>3</sup> *Sucia Islands*, 23 L. D. 329.



office, held that the subsequent enlargement of a military reservation, so as to include within its limits previously located mining claims, prevented the locator from perpetuating his title by performance of annual work, his only remedy being to relocate the claim upon the restoration of the reservation to the public domain.<sup>1</sup>

But in the opinion given by Attorney-General McVeagh at the request of the secretary of war, referred to in the preceding section, a contrary rule is stated. Mr. McVeagh thus expresses his views:

"It seems to me that where such rights have attached to mineral lands in favor of the locator of a mining claim, the land during the continuance of the claim (*i. e.* so long as it is maintained in accordance with law) becomes by force of the mining laws appropriated to a specific purpose — namely, the development and working of the mine located, and unless congress otherwise provides, it can not, while that right exists, notwithstanding the title thereto remains in the government, be set apart for public uses."<sup>2</sup>

Ever since the promulgation of this opinion the land department has accepted the rule as stated by the attorney-general. This is the accepted doctrine of that department with reference to previously located mining claims within Indian reservations.<sup>3</sup>

The rule is different with reference to inchoate pre-emption claims. As to such classes of claims, the government does not enter into any contract with the settler or incur any obligation that the land occupied by him shall ever be put up for sale. Whatever may be the possessory rights of such occupant as against other claimants under the ordinary land laws, such rights cannot avail against the power of congress to make whatsoever disposition of such lands as it pleases at any time prior to the final entry and purchase.<sup>4</sup>

<sup>1</sup> *Camp Bowie Reservation*, 7 Copp's L. O. 4.

<sup>2</sup> 1 Land Decisions, 542, 554; 8 Copp's L. O. 137.

<sup>3</sup> See, *ante*, § 180.

<sup>4</sup> *Frisbie v. Whitney*, 9 Wall. 187, *Hutchins v. Low* *Yosemite Valley Case*, 15 Wall. 77.



As was said by the supreme court of the United States,—

“ Mere settlement upon the public lands with the intention to obtain title under the pre-emption laws does not create in the settler such a vested interest as deprives congress of the power to dispose of the property.”<sup>1</sup>

But a mining claim perfected under the law is property, in the highest sense of that term. It has the effect of a grant by the government of the right of present and exclusive possession of the lands located<sup>2</sup> against every one, including the United States itself.<sup>3</sup>

A patent issued to the locator adds but little to the security of his title.<sup>4</sup> Mineral lands of the government are always for sale.<sup>5</sup>

One locating them does so upon the express invitation of the government, and under a compact by which he is secured the absolute and exclusive right of enjoyment of his properly discovered and located claim, so long as he complies with the law. While the right of the government undoubtedly exists to extinguish an imperfect and incomplete pre-emption claim, we cannot admit that a similar right exists with reference to perfected mining claims. The nature of the estate held by a pre-emptor and that owned by a locator of a valid and subsisting mining claim is essentially different.

If the rule is correctly stated, it follows necessarily that a locator holding a valid mining claim subsisting at the time the reservation for military purposes is created, has a right to perpetuate his estate and enjoy his property by operating and developing it, and should be entitled to the right of ingress and egress at all reasonable times over the reservation, as well as to all other privileges reasonably

<sup>1</sup> *Shepley v. Cowan*, 91 U. S. 330, 338; *Gonzales v. French*, U. S. Sup. Ct., Nov. 30, 1896.

<sup>2</sup> *Belk v. Meagher*, 104 U. S. 279, 284; *Gwillim v. Donnellan*, 115 U. S. 45.

<sup>3</sup> *McFeters v. Pierson*, 15 Colo. 201; *Gold Hill Q. M. Co. v. Ish*, 5 Ore. 104; *Seymour v. Fisher*, 16 Colo. 188.

<sup>4</sup> *Chambers v. Harrington*, 111 U. S. 350; *Shafer v. Constans*, 3 Mont. 369.

<sup>5</sup> Rev. Stats., § 2319.

necessary or incident to the full and fair enjoyment of the property granted to him by the government.

The conclusions reached in reference to Indian reservations, announced in section one hundred and eighty-six, are equally applicable to military reservations.

#### ARTICLE VIII. NATIONAL PARK AND FOREST RESERVATIONS.

§ 196. Manner of creating national park reservations, and purposes for which they are created.	§ 198. Status of mining claims within forest reservations.
§ 197. Manner of creating forest reservations, and pur-	

**§ 196. Manner of creating national park reservations, and purposes for which they are created.** — The most renowned of all national parks is the "Yellowstone," embracing within its limits thirty-five hundred and seventy-five square miles, or two million two hundred and eighty-eight thousand acres, the largest reservation of its kind in the world.<sup>1</sup> It was dedicated and set apart as a public park and pleasure ground for the benefit and enjoyment of the people, by a special act of congress, passed March 1, 1872.<sup>2</sup>

All lands within its limits were by the terms of the act withdrawn from settlement, occupancy, or sale under the laws of the United States, and the secretary of the interior was authorized to make regulations for the government of the park, which provide, among other things, for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonders within the park, and their retention in their natural condition.<sup>3</sup>

The act further declares that all persons who should locate, settle upon, or occupy the same, or any part thereof,

<sup>1</sup> Public Domain, 1294

<sup>2</sup> Rev. Stats. §§ 2474, 2475.

<sup>3</sup> For regulations governing the park, see Public Domain, 1296.

except for certain prescribed purposes, under permission of the secretary of the interior, shall be considered as trespassers.

Several other reservations were subsequently created, for similar purposes, the acts of dedication being drawn upon lines parallel to the Yellowstone act. The acts of September 25, 1890,<sup>1</sup> and of October 1, 1890, reserving lands in the vicinity of the Yosemite valley in California,<sup>2</sup> are of this class. The effect of these reservations is the same as in the case of Indian and military reservations—that is, to absolutely withdraw the lands from settlement, entry, occupation, and purchase,—and the rules of law applicable to the latter classes of reservations apply with equal force to national parks. It is unnecessary to here repeat these rules. As these parks are dedicated by act of congress, it will probably require a congressional act to restore them to the public domain.

**§ 197. Manner of creating forest reservations, and purposes for which they are created.**—We do not encounter forest reservations as a distinctive class until within a recent period. By an act of congress, passed March 3, 1891,<sup>3</sup> the president of the United States was authorized from time to time to set apart and reserve in any state or territory having public land bearing forests in any part of the public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, the establishment of such reservations and their limits to be declared by executive proclamation.

Under this law, numerous forest reservations have been declared, notably those adjoining the Yellowstone park,<sup>4</sup> and the following in the several states and territories:—

In Colorado: The Battlement Mesa:<sup>5</sup> Pike's Peak:<sup>6</sup> Plum Creek:<sup>7</sup> South Platte:<sup>8</sup> White River Plateau.<sup>9</sup>

<sup>1</sup> 26 Stat., at Large, 478.

<sup>2</sup> *Id.* 650.

<sup>3</sup> *Id.*, p. 1103, § 24.

<sup>4</sup> *Id.* 1585; 27 Stat., at Large, 989.

<sup>5</sup> Dec. 24, 1892, 27 Stat., at Large, 1053.

<sup>6</sup> Feb. 11, 1892, *Id.* 1006.

<sup>7</sup> June 23, 1892, *Id.* 1029.

<sup>8</sup> Dec. 9, 1892, *Id.* 1044.

<sup>9</sup> Oct. 16, 1891, *Id.* 993.

In Oregon: The Ashland and Cascade;<sup>1</sup> Bull Run.<sup>2</sup>

In California: The San Bernardino;<sup>3</sup> San Gabriel;<sup>4</sup> Sierra;<sup>5</sup> Trabuco Cañon.<sup>6</sup>

In Washington: The Pacific.<sup>7</sup>

In New Mexico: The Pecos River.<sup>8</sup>

In Arizona: The Grand Cañon.<sup>9</sup>

In Alaska: Afognak Island.<sup>10</sup>

The object of these reservations was to reserve public lands in mountainous and other regions which are covered with timber or undergrowth, at the head-waters of rivers, and along the banks of streams, creeks, and ravines, where such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below.<sup>11</sup>

The data upon which these reservations are proclaimed are supplied by reports of special agents of the general land office, and upon these reports the commissioner of the general land office or secretary of the interior orders the lands embraced in the report temporarily withdrawn from the operation of the public land laws, pending the formal proclamation by the president. This action of the department officers in ordering these withdrawals is deemed in law the act of the president.<sup>12</sup>

<sup>1</sup>Sept. 28, 1893, 28 Stats. at Large, 1240, 1243.

<sup>2</sup>June 17, 1892, 27 Stats. at Large, 1027.

<sup>3</sup>Feb. 25, 1893, *Id.* 1068.

<sup>4</sup>Dec. 20, 1892, *Id.* 1049.

<sup>5</sup>Feb. 14, 1893, *Id.* 1059.

<sup>6</sup>Feb. 27, 1893, *Id.* 1063.

<sup>7</sup>Feb. 20, 1893, *Id.* 1063.

<sup>8</sup>Jan. 11, 1892, *Id.* 998.

<sup>9</sup>Feb. 20, 1893, *Id.* 1064.

<sup>10</sup>*Id.* 1052.

<sup>11</sup>See instructions relating to timber reservations, May 15, 1891, 12 L. D. 499.

<sup>12</sup>*Wolsey v. Chapman*, 101 U. S. 755, 769; *Wilcox v. Jackson*, 13 Peters, 498; *In re State of California*, 20 L. D. 327; *Battlement Mesa Forest Reserve*, 16 L. D. 190.

An order of withdrawal takes effect on the day of its date, not on the date notice is received at the local office.<sup>1</sup>

As was said by Judge Bellinger, sitting as circuit judge for the district of Oregon,<sup>2</sup> the reservation of these lands is an appropriation to a special public use, and is therefore a disposal of them, so far as the public domain is concerned.

Reservations of this class may be restored to the public domain by executive proclamation, without special authority of congress.<sup>3</sup>

**§ 198. Status of mining claims within forest reservations.**—The rules heretofore enunciated with reference to mining claims within Indian and military reservations apply with equal force to forest reservations. However, the proclamation itself provides specially for preserving the status of mining claims valid and subsisting at the date of the withdrawal.

All the proclamations creating forest reservations, with one or two exceptions, contain the following clauses:—

“ Excepting from the force and effect of this proclamation all lands which may have been prior to the date hereof embraced in any legal entry, or covered by any lawful filing, duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired ; and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith.

“ *Provided*, that this exception shall not continue to apply to any particular tract of land, unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, settlement, or location was made.”

In some instances congress has opened forest reservations for the location of mining claims. An act of this character was passed at the first session of the fifty-fourth congress (February 26, 1896), which provides that the

<sup>1</sup> *In re Zumwalt*, 20 L. D. 32; *Currie v. State of California*, 21 L. D. 134.

<sup>2</sup> *United States v. Tygh Valley L. & S. Co.*, 76 Fed. 693.

<sup>3</sup> *Opinion of Asst. Atty-Gen. Shields*, 14 L. D. 209.

Pike's Peak, Plum Creek, and South Platte forest reservations, in Colorado,—

"Shall be open to the location of mining claims therein for gold, silver, and cinnabar, and that title to such mining claims may be acquired in the same manner as it may be acquired to mining claims upon the other mineral lands of the United States for such purposes; *provided*, that all locations of mining claims heretofore made in good faith within said reservation, and which have been held and worked in the same manner as mining claims are held and worked under existing law upon the public domain, are validated by this act."

And, by a subsequent section, the right to cut timber from such claim for actual mining purposes was authorized.

In the absence of such permission of congress no mining claim can be located within the limits of a forest reservation after the date of withdrawal or proclamation.<sup>1</sup>

#### ARTICLE IX. HOMESTEAD AND OTHER AGRICULTURAL CLAIMS.

§ 202. Introductory.	§ 207. Proceedings for the determination of the character of the land.
§ 203. Classification of laws providing for the disposal of the public lands.	§ 208. When decision of land department becomes final.
§ 204. Manner of acquiring homestead claims.	§ 209. The reservation of "known mines" in the pre-emption laws.
§ 205. Nature of inceptive right acquired by homestead claimant.	§ 210. Timber and stone lands.
§ 206. Location of mining claims within homestead entries,	§ 211. Scrip.
	§ 212. Desert lands.

§ 202. *Introductory.*—We have no particular concern with the manner of acquiring title to lands of the public domain, other than those falling within the purview of

<sup>1</sup> By an act of congress, passed May 14, 1896, the secretary of the interior is empowered to permit the use of a right of way to the extent of twenty-five feet, with the use of necessary ground, not exceeding forty acres, within forest reservations, for the purpose of generating, manufacturing, and distributing electric power.

the mining laws, except in so far as the administration of the public land system requires the adjustment of controversies between mineral claimants and those asserting privileges under the homestead and other laws applicable to public lands which are non-mineral in character. Incidentally, we are called upon to investigate the general scope of the latter class of laws, the character of lands to which they relate, the rules governing the determination of conflicts arising between mineral and other claimants, and the point of time in the proceedings seeking the transmission of title when these controversies are to be finally determined.

**§ 203. Classification of laws providing for the disposal of the public lands.**—The existing laws providing for the disposal of the public domain may be thus classified:—

(1) Those regulating the acquisition and enjoyment of rights upon public mineral lands, including in this designation laws applicable to coal and salines ;

(2) The townsite laws ;

(3) The homestead laws ;

(4) Laws regulating the sale of lands chiefly valuable for timber or stone ;

(5) Laws applicable to desert lands ;

(6) The appropriation of lands by “covering” with bounty land warrants, agricultural college, private land, and other classes of “scrip.”

The pre-emption laws which, in one form or another, existed from an early period of our history until March 3, 1891, were repealed on that date,<sup>1</sup> and no longer form a part of our public land system, except so far as may be necessary to preserve and perfect rights accruing prior to the passage of the repealing act.

The timber-culture laws, originally enacted March 3, 1873,<sup>2</sup> a substitute for which was passed June 14, 1878,<sup>3</sup>

<sup>1</sup> 26 Stats. at Large, 1093. <sup>2</sup> 17 Stats. at Large, 605. <sup>3</sup> 20 Stats. at Large, 118.



were abrogated by section one of the same act, which effected the repeal of the pre-emption laws.

As to sales at public auction, they are no longer permitted,<sup>1</sup> except in cases of abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes, and other lands under special acts having local application.

Since March 2, 1889,<sup>2</sup> with the exception of lands in the state of Missouri and in other specified localities, no sales or locations at private entry are allowed.<sup>3</sup>

As to the townsite laws, we have in a preceding article<sup>4</sup> fully discussed their provisions, and it is unnecessary to further consider them.

For the purposes announced in the introduction to this article, we need devote our attention only to those branches of the public land system which deal with homesteads, timber and stone lands, desert lands, and scrip locations. For certain illustrative purposes, we may also include in the category deserving consideration, the repealed pre-emption laws.

§ 204. **Manner of acquiring homestead claims.**—The homestead laws secure to the head of a family, of lawful age, who is a citizen of the United States, or who has declared his intention to become such, the right to settle upon, enter, and acquire title to not exceeding one hundred and sixty acres of unappropriated non-mineral<sup>5</sup> public lands, by establishing and maintaining residence thereon, and improving and cultivating the land for the continuous period of five years.<sup>6</sup>

To obtain an inceptive right to a homestead, the appli-

<sup>1</sup> Act of March 3, 1891, §§ 9, 10; 26 Stats. at Large, 1099.

<sup>2</sup> 25 Stats. at Large, 854.

<sup>3</sup> *Id.*

<sup>4</sup> See, *ante*, art. v., §§ 169-177.

<sup>5</sup> Rev. Stats., § 2302.

<sup>6</sup> Rev. Stats., § 2289, as amended by act of March 3, 1891, § 5; 26 Stats. at Large, 1093.

cant files with the register of the local land office an application, stating his qualifications, and describing the land he desires to enter. If it appears from the tract-books that the land is of the character subject to entry under the law, and is clear—that is, unappropriated,—the applicant is permitted to make entry of the land; the receiver of the land office issues a receipt for the fees paid for filing the application, a record is made in the local office, and the fact reported to the general land office. If the lands are returned as mineral, and borne on the tract-books as such, the homestead claimant will not be permitted to initiate his right until a hearing is had for the purpose of determining the character of the land. To use the common expression, the mineral must be “proved off,” before any right to the land can be inaugurated under the agricultural land laws. Whatever may be the effect of the surveyor-general’s return as evidence in litigated cases involving the character of the land,<sup>1</sup> the land officers in administering the land laws accept such return as controlling their action in the first instance.

**§ 205. Nature of inceptive right acquired by homestead claimant.**—It would seem that the estate acquired by a homestead claimant who has filed his application and received his preliminary receipt from the receiver of the land office, is of greater dignity than that acquired by filing a declaratory statement under the pre-emption laws. By the pre-emption laws the United States did not enter into any contract with the settler, or incur any obligation that the land occupied by him should ever be offered for sale. They simply declared that, in case their lands were thrown open for sale, the privilege to purchase should be first given to parties who had settled upon and improved them.<sup>2</sup>

<sup>1</sup>See, *ante*, §§ 105, 106, 107.

<sup>2</sup>*Frisbie v. Whitney*, 9 Wall. 187; *Hutchins v. Low* (Yosemite Valley Cases), 15 Wall. 77; *Campbell v. Wade*, 132 U. S. 34; *Black v. Elkhorn M. Co.*, 49 Fed. 549.

Public land covered by a pre-emption filing, as to which there has been no payment made or final certificate issued, may be appropriated by congress to public purposes, or otherwise disposed of, without infringing any legal right held by the pre-emptioner.

In an opinion of Attorney-General McVeagh, given at the request of the secretary of war,<sup>1</sup> it was stated, that upon the "entry" by the homestead claimant at the local land office, a right in his favor would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation; that this right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions, and until forfeited by failure to perform the conditions, it must prevail, not only against individuals, but against the government; that, in contemplation of the homestead law, the settler acquires an immediate interest in the land, which, for the time being at least, becomes severed from the public domain.

The land department has invariably acted upon this theory; and the supreme court of the United States has given its sanction to the rule that such an entry, so long as it remains subsisting, is such an appropriation of the tract as segregates it from the public domain.<sup>2</sup> Innumerable filings under the pre-emption laws have been accepted for the same tract by the land office; but from the moment a homestead entry is accepted and the preliminary receipt issued, no further applications or filings for the tract are permitted, so long as the entry remains uncanceled.

Although the land may be in fact mineral in character, and a mining claim be located thereon, no application to patent such mining claim will be received by the land officers until a hearing is had to determine the character of the land.<sup>3</sup>

<sup>1</sup> 2 Copp's Pub. Land Laws, 1198.

<sup>2</sup> *Hastings etc. R. R. v. Whitney*, 132 U. S. 357, 364; *Kan. Pac. Ry. v. Dunmeyer*, 113 U. S. 629.

<sup>3</sup> *Hooper v. Ferguson*, 2 L. D. 712.

If the land be found at such hearing to be mineral in character, a cancellation *pro tanto* of the homestead entry will be ordered, and the mineral lands will be segregated, whereupon the mineral applicant may proceed to patent.

**§ 206. Location of mining claims within homestead entries.**—As lands which are essentially mineral in character cannot be the subject of appropriation under the homestead laws, but may be appropriated under the mining laws, an entry within the limits of a homestead claim, for the purpose of initiating a mining right, may be made at any time prior to the issuance of the final certificate to the homestead claimant, if such entry be made in good faith and without force or violence. The principles of law applicable to such cases will be found presented in the article dealing with "Townsites,"<sup>1</sup> and the one treating of "Occupancy without color of title."<sup>2</sup> It will be unnecessary to here repeat what is there said.

**§ 207. Proceedings for the determination of the character of the land.**—As heretofore indicated,<sup>3</sup> a mineral claimant may take the initiative in securing an investigation as to the character of the land covered by a homestead filing for the purpose of clearing the records and enabling him to proceed to his patent. Should this be not done, the determination of the quality and character of the land necessarily arises at the time the homestead claimant presents his application to make final proof for the purpose of obtaining his patent. The practice governing these proceedings is controlled by the regulations prescribed by the secretary of the interior, and will be found in the appendix to this treatise. Provisions are made for citing the interested parties to appear before the local land officers, where testimony may be adduced in support of their respective contentions. In these proceedings the return of the surveyor-general is *prima facie* evidence of the character of

<sup>1</sup> See, *ante*, art. v., §§ 166-177.

<sup>3</sup> See, *ante*, § 205.

<sup>2</sup> See, *post*, art. x., §§ 216-219.

the land, and the burden of proof rests upon him who seeks to contradict the return. The mineral character of the land must be established as a present fact.<sup>1</sup>

The question is really one of comparative value — Is the tract more valuable as a present fact for the mineral which it contains than for agricultural purposes?<sup>2</sup>

We have heretofore endeavored to formulate such rules for the determination of this question as seem to fall within the sanction of the law as determined by the courts and the land department. These rules will be found stated in a previous chapter,<sup>3</sup> and further repetition is unnecessary. The land sought to be subjected to the operation of the mining laws must be mineral in fact, and not in theory. A tract of land containing mineral products in quantities sufficient to justify a prudent man in the expenditure of time and money in extracting or developing it is mineral in fact;<sup>4</sup> but the law cannot be subverted to gratify a mere whim. While the mining interests are entitled to and must receive protection against the encroachments of persons who, under the guise of agricultural claimants, seek to secure title to large tracts of mining land, the rights of *bona fide* homestead claimants to lands clearly agricultural in character are also entitled to the same protection against adverse combinations of miners.<sup>5</sup>

The question of the character of land is always one of fact, and the decisions of the land department upon questions of fact in cases clearly within its jurisdiction are conclusive.<sup>6</sup>

<sup>1</sup> *Hamilton v. Anderson*, 19 L. D. 168; *Magaha G. M. Co. v. Ferguson*, 6 L. D. 218; *Dughi v. Harkins*, 2 L. D. 721; *Cleghorn v. Bird*, 4 L. D. 478; *Roberts v. Jepson*, *Id.* 66. See, *ante*, §§ 94, 98.

<sup>2</sup> *Davis v. Weibbold*, 139 U. S. 507; *United States v. Reed*, 28 Fed. 482; *Ah Yew v. Choate*, 24 Cal. 562; *Mitchell v. Brown*, 3 L. D. 66; *Magaha G. M. Co. v. Ferguson*, *Id.* 231; *Perrano v. Pendola*, 10 L. D. 506; *Tinkham v. McCallrey*, 13 L. D. 517; *Winters v. Bloss*, 14 L. D. 36; *Savage v. Boynton*, 12 L. D. 612; *Watson v. Batten*, 14 L. D. 54.

<sup>3</sup> Tit. III., ch. I., §§ 94-98.

<sup>4</sup> See, *ante*, § 98.

<sup>5</sup> *Kenna v. Dillon*, *Copp's Min. Dec.* 93.

<sup>6</sup> *Parley's Park v. Kerr*, 130 U. S. 256; *Pac. M. & M. Co. v. Spargo*, 8 Saw. 645; *Cowell v. Lammers*, 10 Saw. 248, 257; *Barden v. N. P. R. R.*, 154

The courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands.<sup>1</sup>

**§ 208. When decision of land department becomes final.**—Before final certificate issues, a homestead entry is open to attack on the ground that the land embraced therein is mineral in character, without regard to the date of the alleged discovery.<sup>2</sup>

The submission of final homestead proof will not preclude a hearing as to the subsequent discovery of mineral upon the land involved where final certificate is not issued and the general land office requires new proof to be made.<sup>3</sup>

Any intermediate determination of the character of the land which does not result, and which is not intended to result, in its final disposal to one claimant or the other, does not preclude subsequent investigation on the part of the department as to the character of such land, inasmuch as the department retains jurisdiction to consider and determine the character of the land claimed until deprived thereof by the issuance of the patent.<sup>4</sup>

A decision of the department in such intermediate proceedings, holding a tract to be non-mineral, is conclusive up to the period covered by the hearing; but such decision will not preclude a further consideration, based on subsequent exploration.<sup>5</sup>

U. S. 288; *United States v. Winona & St. P. R. R.*, 67 Fed. 948; *Lee v. Johnson*, 116 U. S. 48; *Johnson v. Towsley*, 13 Wall. 72; *Warren v. Van Brunt*, 19 Wall. 646; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530; *Marquez v. Frisbie*, 101 U. S. 473; *Vance v. Burbank*, *Id.* 514; *Quinby v. Conlan*, 104 U. S. 420; *St. Louis Smelting Co. v. Kemp*, *Id.* 636; *Steel v. St. Louis Smelting Co.*, 106 U. S. 447; *Baldwin v. Stark*, 107 U. S. 463; *United States v. Minor*, 114 U. S. 233; *Grant v. Oliver*, 91 Cal. 158; *Shanklin v. McNamara*, 87 Cal. 371; *Powers v. Leith*, 53 Cal. 711; *Hays v. Steiger*, 76 Cal. 555; *Hess v. Bolinger*, 48 Cal. 349; *Caldwell v. Bush*, 45 Pac. 488.

<sup>1</sup> *Litchfield v. The Register*, 9 Wall, 575; *Gaines v. Thompson*, 7 Wall. 347; *Cox v. McGarrahan*, 9 Wall. 298.

<sup>2</sup> *Jones v. Driver*, 15 L. D. 514.

<sup>3</sup> *Spratt v. Edwards*, 15 L. D. 290.

<sup>4</sup> *Searle Placer*, 11 L. D. 441.

<sup>5</sup> *Stinchfield v. Pierce*, 19 L. D. 12; *McCharles v. Roberts*, 20 L. D. 564; *Dargin v. Koch*, *Id.* 384.



When the land has once been adjudged to be mineral, if subsequent development prior to patent demonstrates that the mineral then found has disappeared, or that it is worthless and unprofitable to work as a mining claim, and abandoned as such, it is not in any sense a readjudication of the former issues.<sup>1</sup>

As was said by the department, in cases of railroad grants, a hearing had as to the agricultural or mineral character of a number of tracts of land claimed under a railroad grant, and a judgment thereon that a specific tract included therein is in fact agricultural, will not preclude a subsequent inquiry as to the character of such tract on the protest of a mineral claimant prior to the issuance of the patent therefor, if the showing is clear and convincing.<sup>2</sup>

We see no reason why the rule thus announced should not be applied to all classes of entries. So long as the land department retains jurisdiction over the land, it may prevent the patenting of mineral lands under agricultural laws, and *vice versa*. This jurisdiction does not cease until the patent has actually issued.<sup>3</sup>

Lands duly and properly entered for a homestead under the homestead laws are, and continue to be, from the time of entry and pending proceedings before the land department, lands of the United States until patent is issued.<sup>4</sup>

The patent, when issued, is the judgment of a tribunal charged under the law with investigating the facts, and thereafter the character of the land is no longer open to contestation.

The final certificate issued by the receiver of a United States land office after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be the equivalent of a patent.

The holder of such certificate is vested with the complete

<sup>1</sup> Dargin v. Koch, 20 L. D. 384.

<sup>2</sup> Barnstetter v. C. P. R. R., 21 L. D. 464. See, also, Zadig v. C. P. R. R., 20 L. D. 26.

<sup>3</sup> Searle Placer, 11 L. D. 441; Wingate Placer, 22 L. D. 704.

<sup>4</sup> Shiver v. United States, 150 U. S. 491.



equitable title; and after its issuance the government holds the dry legal title for the benefit of such holder.<sup>1</sup>

Such certificate having been once issued upon a perfected final agricultural entry, no subsequent discovery of mineral can defeat the title of the holder.<sup>2</sup>

While such certificate, so long as it remains uncanceled, possesses the force of the patent, yet the power of supervision by the commissioner of the general land office over the acts of the register and receiver of the local land office in the disposition of the public lands undoubtedly authorizes him, in proper cases, to correct and annul entries of land allowed by them. The exercise of such power is necessary to the administration of the land department.<sup>3</sup>

If the proceedings before the register and receiver are defective, or the proofs insufficient or fraudulent, or the jurisdictional facts wanting, the certificate may afterwards be canceled by the commissioner or secretary of the interior; or the entry may be suspended, a hearing ordered, and the party notified to show, by supplemental proof, a full compliance with the law, and on failure to do so, the entry may then be canceled.<sup>4</sup>

An agricultural entry covering land that is mineral in character, with the knowledge of prior mineral locations thereon, and of the fact that the land was at such time regarded by many in the vicinity as valuable for the mineral therein, must be canceled, as having been allowed for "known" mineral land.<sup>5</sup>

<sup>1</sup> *Witherspoon v. Duncan*, 4 Wall. 210; *Carroll v. Safford*, 3. How. 441; *Wis. R. R. v. Price Co.*, 133 U. S. 496; *Cornelius v. Kessel*, 128 U. S. 456; *Deffebach v. Hawke*, 115 U. S. 392; *Benson M. & S. Co. v. Alta M. & S. Co.*, 145 U. S. 428; *Hamilton v. Southern Nev. G. & S. M. Co.*, 13 Saw. 113; *Amador Medean Co. v. S. Spring Hill Co.*, *Id.* 523; *Aurora Hill Cons. v. 85 M. Co.*, 12 Saw. 355; *Pac. Coast M. & M. Co. v. Spargo*, 8 Saw. 645; *Deno v. Griffin*, 20 Nev. 249.

<sup>2</sup> *Pac. Coast M. & M. Co. v. Spargo*, 8 Saw. 645; *Arthur v. Earle*, 21 L. D. 92; *Rea v. Stephenson*, 15 L. D. 37.

<sup>3</sup> *Harkness v. Underhill*, 1 Black, 316; *Knight v. U. S. Land Assn.*, 142 U. S. 161; *Cornelius v. Kessel*, 128 U. S. 456, 461; *Ger. Ins. Co. v. Hayden*, 21 Colo. 127.

<sup>4</sup> *Hastings etc. R. R. v. Whitney*, 132 U. S. 357, 364; *Caldwell v. Bush*, 45 Pac. 488; *Hosmer v. Wallace*, 47 Cal. 461; *Hays v. Steiger*, 76 Cal. 555.

<sup>5</sup> *Aspen Cons. M. Co. v. Williams*, 23 L. D. 34.

When such certificate is suspended, it cannot be used as evidence so long as the suspension continues.<sup>1</sup> Its cancellation, of course, deprives it of all force.<sup>2</sup>

This power of supervision and correction, however, is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered.<sup>3</sup>

Generally speaking, and for all practical purposes, the issuance of the final certificate to an agricultural entryman closes the case, and no collateral attack on the certificate so issued is allowed.

The land embraced in such final entry is absolutely withdrawn from the public domain, and is no longer subject to exploration or purchase under the mining laws, although it may subsequently appear that the lands are essentially mineral. Where a contest is pending, as a rule the certificate does not issue until final disposal is made, on appeal to the commissioner, and from him to the secretary, if such appeals be taken. Under ordinary circumstances, the supervision of the general land office at Washington is confined to an examination of the record as made in the local offices, for the purposes of ascertaining whether the facts presented justify the conclusions reached, the requisite jurisdictional facts appearing.

§ 209. The reservation of "known mines" in the pre-emption laws.—We have heretofore said<sup>4</sup> that the term "known mines," as used in the pre-emption act of 1841, is not the precise equivalent of the term "mineral lands," as used in the mining laws, and should undoubtedly receive a more limited interpretation. It will be borne in mind that when this pre-emption act was passed the only mines of which the government had any knowledge were those

<sup>1</sup> *Figg v. Handley*, 52 Cal. 295; *Vance v. Kohlberg*, 50 Cal. 346; *Vanton-goren v. Hetterman*, 35 Dak. 180, 223; *Hestres v. Brennan*, 50 Cal. 211; *United States v. Steenerson*, 50 Fed. 504.

<sup>2</sup> *Murray v. Polglase*, 17 Mont. 455.

<sup>3</sup> *Cornelius v. Kessel*, 128 U. S. 456, 461.

<sup>4</sup> See, *ante*, § 80, p. 292.

containing copper, in the region of the great lakes, and those containing lead, in the Mississippi valley.<sup>1</sup>

The privilege of pre-emption during that period could be exercised only as to surveyed lands, and the public surveys had not been extended west of the Mississippi river. The government had at that time inaugurated a policy of leasing lead mines, and it is probable that the framers of these earlier laws had particular reference to those which came within the category of opened mines. In construing the term "known mines," as used in this law, which was subsequently re-enacted in later acts, the supreme court of the United States announced its opinion that, so far as the decision of that court had gone, no lands had been held to be "known mines," unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine, which had been worked or was capable of being worked.<sup>2</sup> Said that court, after reviewing the case of *Deffebach v. Hawke*:—<sup>3</sup>

"If upon the premises at that time there were not  
"actual 'known mines' capable of being profitably worked  
"for their product, so as to make the land more valuable for  
"mining than for agriculture, a title to them acquired under  
"the pre-emption act can not be successfully assailed."<sup>4</sup>

We think we are justified in our view, that "known  
"mines" and "mineral lands" are not legal equivalents. At all events, the pre-emption laws have been repealed, and the term "known mines" has been eliminated from the statute-books. The nearest approach to an equivalent still remaining in the public land laws is the word "mine," as used in the townsite laws,<sup>5</sup> which laws have been fully discussed in a previous article.<sup>6</sup>

<sup>1</sup> See, *ante*, § 36.

<sup>2</sup> *Colo. C. & I. Co. v. United States*, 123 U. S. 307, 327.

<sup>3</sup> 115 U. S. 392.

<sup>4</sup> *Colo. C. & I. Co. v. United States*, 123 U. S. 307, 328. See, also, *Richards v. Dower*, 81 Cal. 44; *United States v. Reed*, 28 Fed. 482; *Gold Hill Q. M. Co. v. Ish*, 5 Ore. 104; *In re Abercrombie*, 6 L.D. 393; *Bellows v. Champion*, 4 Copp's L. O. 17; *Nancy Ann Caste*, 3 L. D. 169; *Harnish v. Wallace*, 13 L. D. 108.

<sup>5</sup> Rev. Stats., § 2392.

<sup>6</sup> See, *ante*, art. v., § 176.

§ 210. **Timber and stone lands.**—The act of June 3, 1878,<sup>1</sup> commonly called the "Stone and timber act," was originally confined in its operations to California, Oregon, Nevada, and Washington,<sup>2</sup> but by an amendatory act, passed August 1, 1892, its provisions were extended to all the public land states.<sup>3</sup>

Under this act lands chiefly valuable for timber or stone, unfit for cultivation, and consequently not subject to disposal under the homestead laws, may be entered. The quantity is limited to one hundred and sixty acres to any one person.

An application to purchase under this act must be supported by evidence that the tract contains no mining or other improvements, except for ditch or canal purposes (when any such exist), nor any valuable deposit of gold, silver, cinnabar, copper, or coal.

Provisions are made for the determination of the character of the lands prior to the issuance of patents, and for the issuance of final certificates of entry upon payment.

The lands embraced within an application to purchase lands under this act are not withdrawn from the mass of the public domain until such final certificate is issued, and until that time are subject to exploration and purchase under the mining laws, if they are, in fact, mineral in character.<sup>4</sup>

The same principles of law in this respect apply to timber and stone entries as to inchoate homestead entries, discussed in preceding sections. The judgment of the department, culminating in the issuance of the final receipt or certificate, is final and conclusive as to the character of the land, and no subsequent discovery of mineral can affect the title of the purchaser. This is a universal rule governing all classes of entries on the public domain.

<sup>1</sup> 20 Stats. at Large, 89.

<sup>2</sup> *United States v. Smith*, 8 Saw. 101; *United States v. Benjamin*, 10 Saw. 264.

<sup>3</sup> 27 Stats. at Large, 348.

<sup>4</sup> *Kaweah Colony*, 12 L. D. 326.

With particular reference to lands chiefly valuable for building-stone, the department had held at different times that prior to passage of the stone and timber act such lands might be entered under the placer mining laws,<sup>1</sup> which practice was sustained by some of the courts,<sup>2</sup> and denied by others.<sup>3</sup>

The passage of the act of August 4, 1892,<sup>4</sup> however, restored this class of lands to the category of mineral lands, and henceforward they are subject to entry under the so-called placer mining laws. In the opinion of the land department, this last act did not withdraw such lands from entry under the stone and timber act,<sup>5</sup> thus intimating that stone lands may be entered either as placers or under the stone and timber act, at the option of the claimant.

§ 211. **Scrip.**—There are innumerable classes of so-called land scrip—such as agricultural college, Porterfield, Valentine, Sioux half-breed, supreme court, and others in infinite variety, issued under special laws of congress, enabling the holder to “cover” unappropriated public lands, surrendering such scrip in payment for the lands sought to be entered. Mineral lands cannot be so selected or covered with any class of scrip.<sup>6</sup>

Selections of land for the purpose of utilizing scrip are, of course, under the supervision of the land department, whose jurisdiction over the land is retained until the selection is finally approved, a certificate to that effect issued, and the scrip surrendered. As in case of other entries, the land department passes upon the character of the land

<sup>1</sup> *Bennett's Placer*, 3 L. D. 116; *McGlenn v. Weinbroer*, 15 L. D. 370; *Vandoren v. Plested*, 16 L. D. 508; *Maxwell v. Brierly*, 10 Copp's L. O. 50. See, *ante*, § 139. *Contra: In re Delaney*, 17 L. D. 120; *Clark v. Ervin*, 17 L. D. 550; *Id.*, 16 L. D. 122; *Conlin v. Kelly*, 12 L. D. 1; *In re Simon Randolph*, 23 L. D. 322.

<sup>2</sup> *Freezer v. Sweeney*, 8 Mont. 508; *Johnson v. Harrington*, 5 Wash. 93.

<sup>3</sup> *Wheeler v. Smith*, 5 Wash. 704.

<sup>4</sup> 27 Stats. at Large, 348.

<sup>5</sup> See Circ. Information, 15 L. D. 360; 23 L. D. 322.

<sup>6</sup> *In re A. V. Weise*, 2 Copp's L. O. 130; *In re Nerce Valle*, *Id.* 178; Com'rs' Letter, 3 Copp's L. O. 83.

applied for, and until such final approval and certification the lands are not withdrawn from the public domain, but are subject to exploration and purchase under the mining laws.

§ 212. **Desert lands.**—By the act of March 3, 1877,<sup>1</sup> supplemented by the act of March 3, 1891,<sup>2</sup> provision is made for the reclamation of desert lands, and the transmission of the title in quantities not exceeding six hundred and forty acres. Mineral lands cannot be acquired under this act. Desert land claimants will rarely come in conflict with mining claimants. Of course, beds of borax, nitrate, and carbonate of soda are found in the desert regions, but their mineral character is generally so obvious that no controversy is likely to arise. It would be much cheaper and more expeditious for a claimant to enter these classes of lands under the placer laws than to attempt to acquire title under the onerous provisions of the desert land laws. Should such conflicts arise, they would be governed by the same general rules of law applicable to other classes of entries discussed in the preceding sections of this article.

#### ARTICLE X. OCCUPANCY WITHOUT COLOR OF TITLE

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| <p>§ 216. Naked occupancy of the public mineral lands confers no title—Rights of such occupant.</p> <p>§ 217. Rights upon the public domain can not be initiated by forcible entry upon the actual possession of another.</p> | <p>§ 218. Appropriation of public mineral lands by peaceable entry in good faith upon the possession of a mere occupant without color of title.</p> <p>§ 219. Conclusions.</p> |
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§ 216. **Naked occupancy of the public mineral lands confers no title—Rights of such occupant.**—Title to mineral lands of the public domain can be initiated and

<sup>1</sup> 19 Stats. at Large, 377; 20 Stats. at Large, 1095.

<sup>2</sup> 26 Stats. at Large, 1095.

acquired only under the mining laws. As was said by the supreme court of the United States,—

“No title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption, homestead, or townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands.”<sup>1</sup>

There can be no strictly lawful possession of such lands, unless that possession is referable to the mining laws.

“There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law, purporting to transfer to him the title, or to give to him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupation.”<sup>2</sup>

As heretofore shown, when dealing with occupants of the public mineral lands for the purposes of trade or business,<sup>3</sup> mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, or one connecting himself with the government, by compliance with the law.<sup>4</sup>

This is the universal rule as to all classes of public lands.<sup>5</sup> While this is true, the occupant has certain rights based upon the fact of actual possession, which, from motives of public policy, are accorded to him.

As was said by the supreme court of California,—

“As against a mere trespasser, one in possession of a portion of the public land will be presumed to be the owner, notwithstanding the circumstance that the court has judicial notice that he is not the owner, but that the

<sup>1</sup> *Deffebach v. Hawke*, 115 U. S. 392, 404.

<sup>2</sup> *Id.*

<sup>3</sup> See, *ante*, § 170.

<sup>4</sup> *Sparks v. Pierce*, 115 U. S. 408.

<sup>5</sup> *Frisbie v. Whitney*, 9 Wall. 187; *Hutchins v. Low*, 15 Wall. 77; *Campbell v. Wade*, 132 U. S. 34; *Jourdan v. Barrett*, 4 How. 169; *Burgess v. Gray*, 16 How. 48; *Gibson v. Chouteau*, 13 Wall. 92; *Oaksmith v. Johnston*, 92 U. S. 343; *Morrow v. Whitney*, 95 U. S. 551.



"government is. This rule has been maintained from motives of public policy, and to secure the quiet enjoyment of possessions which are intrusions upon the United States alone."<sup>1</sup>

This is nothing more than a reiteration of the familiar rule, that, as against a mere intruder, or one claiming no higher or better right than the occupant, possession is *prima facie* evidence of title.<sup>2</sup>

But this is all that can be claimed. As against one connecting himself with the government, this occupancy must yield to the higher right

**§ 217. Rights upon the public domain can not be initiated by forcible entry upon the actual possession of another.**—To what extent actual possession of any portion of the public mineral lands prevents their valid appropriation under the mining laws depends upon the facts and circumstances of each particular case. There are certain recognized principles, however, which are necessarily involved in all such cases, the application of which will, generally speaking, result in their proper solution.

It is a doctrine well established that no rights upon the public domain can be initiated by a forcible entry upon the possession of another. A forcible and tortious invasion of such possession confers no privilege upon the invader, and can not be made the basis of a possessory title. A rightful seisin can not flow from a wrongful disseisin.

It has been distinctly held in cases arising under the former pre-emption laws that no right of possession could be established by settlement and improvement upon a tract of land conceded to be public where the pre-emption claimant forcibly intruded upon the actual possession of another who, having no other valid title than possession, had already settled upon, inclosed, and improved the tract;

<sup>1</sup> Brandt v. Wheaton, 52 Cal. 430.

<sup>2</sup> Campbell v. Rankin, 99 U. S. 261; Atwood v. Fricot, 17 Cal. 38, English v. Johnson, *Id.* 108; Hess v. Winder, 30 Cal. 349.

that such an intrusion was but a naked and unlawful trespass, and could not initiate a right of pre-emption.<sup>1</sup>

In conformity with this rule, it was wisely said by the late Judge Sawyer, in the ninth circuit, district of California, that the laws no more authorize a trespass upon the actual possession and occupation of another claiming a pre-emption right, for the purpose of locating and acquiring the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land; that the law does not encourage or permit for any purpose unlawful intrusions and trespasses upon the actual occupation and possession of another. To permit a right to accrue or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such character as to greatly disturb the public tranquility.<sup>2</sup>

**§ 218. Appropriation of public mineral lands by peaceable entry in good faith upon the possession of a mere occupant without color of title.**—Conceding that the law is correctly stated in the three preceding sections, it is not to be understood that a mere occupant of the public mineral lands can by virtue of such occupancy prevent, under all circumstances, their appropriation for mining purposes. The law interdicts entries effected with force and violence for any purpose. But a mere intruder upon the public lands, a mere occupant, whose possession is not referable to some law or right conferred by virtue of an instrument giving color of title, can not by reason of such occupancy prevent a peaceable entry in good faith by one seeking to avail himself of the privilege vouchsafed by the mining laws.

The doctrine that by mere entry and possession a right may be acquired to the exclusive enjoyment of any given quantity of the public mineral lands, was condemned by

<sup>1</sup> *Atherton v. Fowler*, 96 U. S. 513; *Quinby v. Conlan*, 104 U. S. 421; *Hosmer v. Wallace*, 97 U. S. 575.

<sup>2</sup> *Cowell v. Lammers*, 10 Saw. 246.

the supreme court of California in its earliest decisions. If such doctrine could be maintained, said that court,—

“It would be fraught with the most pernicious and disastrous consequences. The appropriation of these lands in large tracts for agricultural and grazing purposes, and the concentration of the mining interest in the hands of a few persons, to the exclusion of the mass of the people of the state, are some of the evils which would necessarily result from such a doctrine.”<sup>1</sup>

There is no grant from the government under the acts of congress regulating the disposal of mineral lands, unless there is a location according to law and the local rules and regulations. Such a location is a condition precedent to the grant. Mere possession, not based upon a valid location, would not prevent a valid location under the law.<sup>2</sup> This doctrine is clearly established by the supreme court of the United States in *Belk v. Meagher*,<sup>3</sup> affirming the decision of the supreme court of Montana. In that case Belk undertook to locate a mining claim. His entry was peaceable, and he did all that was necessary to perfect his rights, if the premises had been at the time open for that purpose. But at the time of such attempted appropriation the ground was covered by a prior, and, as the court found, a valid, subsisting location. Subsequently this prior subsisting location lapsed, and thereafter Meagher relocated the claim, his entry for that purpose being made peaceably and without force. Belk brought ejectment, and being unsuccessful in the territorial courts, took the case on writ of error to the supreme court of the United States.

It having been established that when Belk made his relocation, in December, 1876, the claim of the original locators was still subsisting and valid, and remained so until January 1, 1877, the supreme court considered three propositions of law as necessarily arising in the case:—

<sup>1</sup> *Smith v. Doe*, 15 Cal. 101, 105; *Gillan v. Hutchinson*, 16 Cal. 154.

<sup>2</sup> *Belk v. Meagher*, 3 Mont. 65, 80.

<sup>3</sup> 104 U. S. 270, 284.

(1) Whether Belk's relocation was valid as against everybody but the original locators, his entry being peaceable and without force;

(2) Whether, if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed;

(3) Whether, even if the relocation of Belk was invalid, Meagher could, after the 1st of January, 1877, make a relocation which would give him, as against Belk, an exclusive right to the possession and enjoyment of the property, the entry for that purpose being made peaceably and without force.

All three propositions were resolved against Belk, the court holding that he had made no such location as prevented the lands from being in law vacant, and that others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough to prevent an entry peaceably and in good faith for the purpose of securing a right under the acts of congress to the exclusive possession and enjoyment of the property. This doctrine was held not to be in conflict with the rule announced by the same court in *Atherton v. Fowler*,<sup>1</sup> cited in a preceding section, wherein it was determined that a right of pre-emption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved, and inclosed the property.

The controlling force of the doctrine of *Belk v. Meagher* has been abundantly recognized by the courts since its promulgation.<sup>2</sup>

<sup>1</sup> 96 U. S. 513.

<sup>2</sup> *Noyes v. Black*, 4 Mont. 527; *Hopkins v. Noyes*, *Id.* 550; *Sweet v. Weber*, 7 Colo. 443; *Horswell v. Ruiz*, 67 Cal. 111; *Russell v. Hoyt*, 4 Mont. 412; *Du Prat v. James*, 65 Cal. 555; *Russell v. Brosseau*, *Id.* 605; *Garthe v. Hart*, 73 Cal. 541.

A similar doctrine had been previously announced by Judge Deady, United States district judge, in Oregon,<sup>1</sup> where a location of mining ground in the possession of Chinese was upheld, on the theory that this class of aliens could acquire no rights by location, purchase, or occupancy upon the mineral lands of the public domain.

As was said by the supreme court of Montana,—

"Possession within a mining district, to be protected "or to give vitality to a title, must be in pursuance of the "law and the local rules and regulations. Possession, in "order to be available, must be properly supported. . . . "The mere naked possession of a mining claim upon the "public lands is not sufficient to hold such claim against "a subsequent location made in pursuance of the law, and "kept alive by a compliance therewith."<sup>2</sup>

The right of possession comes only from a valid location.<sup>3</sup>

Possession is good as against mere intruders; but it is not good as against one who has complied with the mining laws.<sup>4</sup>

Several cases appear in the reports which might be construed to be not entirely in harmony with the rule announced in the foregoing cases.<sup>5</sup> Some of them recognize the doctrine as to all ground not covered by the *pedis possessio*. Others do not mention the element of force as entitled to controlling weight in determining the question. In most of these cases the statement of facts upon which the decisions are based is very meager, and we are therefore unable to say to what extent, if at all, any of them repudiate the doctrine of *Belk v. Meagher*. Be that as it may, it cannot be denied that if there is any conflict between the decisions here referred to and the doctrine announced by the supreme court of the United States, they must, to the extent of such conflict, be disregarded.

<sup>1</sup> *Chapman v. Toy Long*, 4 Saw. 23.

<sup>2</sup> *Hopkins v. Noyes*, 4 Mont. 550, 556.

<sup>3</sup> *Hammond v. Foster*, 4 Mont. 421.

<sup>4</sup> *Garthe v. Hart*, 73 Cal. 541, 543.

<sup>5</sup> *Eilers v. Boatman*, 3 Utah, 159; *Armstrong v. Lower*, 6 Colo. 581; *Weise v. Barker*, 7 Colo. 178; *Lebanon M. Co. v. Con. Rep. M. Co.*, 6 Colo. 380; *Faxon v. Barnard*, 4 Fed. 702; *North Noonday v. Orient*, 6 Saw. 507.

§ 219. **Conclusions.** — We are justified in deducing the following general rules upon the subject under discussion:—

(1) Actual possession of a tract of public mineral land is valid as against a mere intruder, or one having no higher or better right than the prior occupant;

(2) No mining right or title can be initiated by a violent or forcible invasion of another's actual occupancy;

(3) If a party goes upon the mineral lands of the United States and either establishes a settlement or works thereon without complying with the requirements of the mining laws, and relies exclusively upon his possession or work, a second party who locates peaceably a mining claim covering any portion of the same ground, and in all respects complies with the requirements of the mining laws, then such second party is entitled to the possession of such mineral ground to the extent of his location as against the prior occupant, who is, from the time said second party has perfected his location and complied with the law, a trespasser.<sup>1</sup>

The peaceable adverse entry by the locator, coupled with the perfection of his location, operates in law as an ouster of the prior occupant.<sup>2</sup>

In some of the states laws are enacted protecting the right of a discoverer upon the public mineral lands for a limited period of time, to enable him to perfect his location. Where no such local statutes are in force, according to the current of authority, by the policy of the law a reasonable time is allowed to such discoverer to complete his appropriation. During such periods the possession or occupation of the discoverer will be protected as against subsequent locators. This subject will be fully considered in another portion of this treatise and the application of the doctrines above enunciated to such cases will there be fully explained.

<sup>1</sup>This is substantially the charge to the jury upheld in *Horswell v. Ruiz*, 67 Cal. 111.

<sup>2</sup>*Belk v. Meagher*, 3 Mont. 65, 80.

## CHAPTER IV.

### OF THE PERSONS WHO MAY ACQUIRE RIGHTS TO PUBLIC MINERAL LANDS.

#### ARTICLE I. CITIZENS.

##### II. ALIENS.

##### III. GENERAL PROPERTY RIGHTS OF ALIENS IN THE STATES.

##### IV. GENERAL PROPERTY RIGHTS OF ALIENS IN THE TERRITORIES.

#### ARTICLE I. CITIZENS.

- |  |                                 |
|--|---------------------------------|
| § 223. Only citizens, or those who have declared their intention to become such, may locate mining claims. | § 225. Minors.                  |
|  | § 226. Domestic corporations.   |
| § 224. Who are citizens.   | § 227. Citizenship, how proved. |

§ 223. Only citizens, or those who have declared their intention to become such, may locate mining claims. - As the paramount proprietor of its public domain, the United States has not only the right to regulate the terms and conditions under which it may be disposed of, but it is also its privilege to designate the persons who may be the recipient of its bounty, and prescribe the qualifications of those who may acquire and enjoy permanent estates on its lands. In the exercise of this privilege, it has ordained that,—

“All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under



“ regulations prescribed by law, and according to the local  
“ customs or rules of miners in the several mining districts,  
“ so far as the same are applicable and not inconsistent  
“ with the laws of the United States.”<sup>1</sup>

Therefore, to lawfully locate and hold a mining claim, the locator must be either a citizen of the United States or he must have declared his intention to become such in the manner provided by the naturalization laws of congress. As to who may attack a location made by an alien, and how it may be attacked, will be fully considered in a succeeding section. We here state simply the abstract rule of law.

**§ 224. Who are citizens.**— It is hardly within the legitimate scope of this treatise to exhaustively discuss the law of citizenship. But as introductory to the presentation of the law governing the qualifications of locators of mining claims, and the effect of alienage upon the validity of titles during the various stages of transmission from the government, as the primary source, to the ultimate grantee, we are justified in presenting in general outline the laws of congress upon the subject, and the decisions of the courts construing them in cases arising under the mining laws.

The fourteenth amendment to the constitution of the United States provides that,—

“ All persons born or naturalized in the United States,  
“ and subject to the jurisdiction thereof, are citizens of the  
“ United States and of the state wherein they reside.”

The clause “ subject to the jurisdiction of the United States ” means completely subject to the political jurisdiction of the United States, and owing them direct and immediate allegiance.<sup>2</sup>

They may be citizens of the United States without being citizens of any particular state.<sup>3</sup>

<sup>1</sup> Rev. Stats., § 2319.

<sup>2</sup> *Elk v. Wilkins*, 112 U. S. 94; *Slaughterhouse Cases*, 16 Wall. 36; *Strauder v. West Virginia*, 100 U. S. 303.

<sup>3</sup> *Slaughterhouse Cases*, 16 Wall. 36; *United States v. Cruikshank*, 92 U. S. 542.

Neither age nor sex is involved in the definition of the word "citizen." It therefore includes men, women, and children,<sup>1</sup> and, for certain purposes, as we shall have occasion to observe later on, corporations organized under the laws of the several states.<sup>2</sup>

Citizenship is either —

- (1) By birth; or
- (2) By naturalization.

Citizens by birth are those born within the United States, or in a foreign country, if at the time of their birth their fathers were citizens.<sup>3</sup>

There are certain exceptions to this rule of natural citizenship.

Children born in the United States of ambassadors and diplomatic representatives, whose residence, by a fiction of law, is regarded as a part of their own country, are not citizens.<sup>4</sup>

Indians born members of any of the Indian tribes within the United States which still hold their tribal relations are not citizens. They are not citizens, even if they have separated themselves from their tribe and reside among white citizens of a state, but have not been naturalized, or taxed, or recognized as citizens by the United States, or by any of the states.<sup>5</sup>

To become citizens, they must comply with some treaty providing for their naturalization or some statute authorizing individuals of special tribes to assume citizenship by due process of law.<sup>6</sup>

The fact that the parents of a child (Chinese) born in the United States are prohibited from becoming citizens

<sup>1</sup>1 Bouvier's Law Dict., *verb. citizen*.

<sup>2</sup>See, *post*, § 226.

<sup>3</sup>Rev.Stats., § 1993; *Ludlam v. Ludlam*, 26 N. Y. 356; *Oldtown v. Bangor*, 58 Me. 353; *State v. Adams*, 45 Iowa, 99.

<sup>4</sup>*In re Look Tin Sing*, 21 Fed. 905.

<sup>5</sup>*Elk v. Wilkins*, 112 U. S. 94.

<sup>6</sup>3 Am. & Eng. Encyc. of Law, p. 245, note 1.

does not militate against the citizenship of the child. Such child is a citizen.<sup>1</sup>

Generally speaking, citizenship by birth is the rule. Ordinarily, a married woman partakes of a husband's nationality,<sup>2</sup> although marriage with an alien produces no dissolution of the native allegiance of the wife.<sup>3</sup>

The law recognizes the right of expatriation; but instances of it are so rare that the subject deserves no attention here.

One not a citizen may become such by complying with the provisions of the federal naturalization laws.<sup>4</sup>

Naturalization gives the alien all the rights of a natural-born citizen. He thereby becomes capable of receiving property by descent, whereas, as an alien, he might not so receive it, and of transmitting it in the same way.<sup>5</sup>

Ordinarily, naturalization is not complete until the lapse of a probationary period after a preliminary declaration of intention to become a citizen. During this period, between the taking out of "first" and "second" papers, the declarant is not considered as a citizen to the extent that he may either exercise the elective franchise or hold office. He is entitled to no privileges other than those specially vouchsafed to him by the law. In the location of mining claims he is endowed with the full rights of a citizen, to the same extent as if his naturalization were completed by taking the final oath and the issuance to him of his final papers. Therefore, for all purposes within the purview of this treatise, we shall treat an alien who has declared his intention to become a citizen as if he were fully naturalized; and when we employ the word "naturalization," it is to be understood as designating the act which confers upon the alien the right to enjoy, in common with citizens, the privilege of locating and purchasing mining claims upon the public domain.

<sup>1</sup> *In re Look Tin Sing*, 21 Fed. Rep. 905.

<sup>2</sup> Wharton on Conflict of Laws, § 11.

<sup>3</sup> *Shanks v. Dupont*, 3 Peters, 242.

<sup>4</sup> Rev. Stats., §§ 2165-2174.

<sup>5</sup> *Jackson, ex dem. Doran v. Green*, 7 Wend. 333.

§ 225. **Minors.**—Minors born in the United States are citizens, and may locate mining claims. There is no requirement in the general mining laws that the citizen shall be of any particular age. To say that minors are not qualified locators, is to say that they are not citizens. The conclusion is strengthened by the circumstance that in some instances the statutes expressly require that the citizen shall be of a particular age before he may acquire certain classes of public lands. Thus, in reference to coal lands, the provision is, that every person above the age of twenty-one years who is a citizen of the United States may enter such lands.<sup>1</sup> A similar provision exists as to homesteads under the federal laws.<sup>2</sup> The expression of a requirement as to age in some instances, and the omission of it in others, is significant.<sup>3</sup> It is quite true that minors may not transmit title during infancy with the same freedom as adults. During this minority they are incapacitated from entering into contracts, except with reference to necessities, and, generally speaking, may act only through guardians, under the supervision of the courts. But this circumstance does not prevent them from acquiring property. As was said by the supreme court of California,—

“Nor is there any reason in the nature of things why a minor may not make a valid location. . . . It may be added that, so far as we know, it is the practice in many mining communities for minors to locate claims.”<sup>4</sup>

The fact that this is the recognized practice in many mining communities is, perhaps, not of controlling weight; but it carries with it the suggestion that a contrary rule would disturb many titles acquired in good faith, and that such rule should not be invoked without the most substantial and cogent reasons.

§ 226. **Domestic corporations.**—By domestic corporations, we mean those created or organized under the laws of the several states of the union, using the term in contradistinction to foreign corporations, or those who owe

<sup>1</sup> Rev. Stats., § 2347.

<sup>2</sup> *Thompson v. Spray*, 72 Cal. 528.

<sup>3</sup> *Id.*, § 2289.

<sup>4</sup> *Id.* 532.

their existence to the laws of foreign countries. The latter class will receive attention when we deal with the subject of aliens. A corporation is a citizen of the state which created it.<sup>1</sup>

A corporation created and existing under the laws of a state is to be deemed a citizen within the meaning of the statute regulating the right to acquire public mineral lands,<sup>2</sup> and as such is competent to purchase and hold a mining claim.<sup>3</sup>

The supreme court of the United States has held that a corporation created under the laws of the states of the union, *all of whose members are citizens* of the United States, is competent to locate, or join in the location, of a mining claim upon the public lands of the United States in like manner as individual citizens.<sup>4</sup>

The italics in the above quotation are ours. Judge Knowles, speaking for the circuit court of appeals in the ninth circuit, is of the opinion that the inference to be drawn from this decision, although not so stated, is that only corporations whose stockholders are citizens can locate mining claims.<sup>5</sup> We do not think that the supreme court intended to lay particular stress upon the word "*all*." If it did, it went entirely beyond the exigencies of the case under consideration. There was nothing in the facts requiring such a ruling. It is probable that the expression was used unadvisedly, and not with the intention of establishing a fixed rule that a corporation organized under the laws of a state could not lawfully acquire or hold unpatented mining claims if one of its stockholders were an alien. In the territories, under the alien act of March 3, 1887,<sup>6</sup> aliens are prohibited from acquiring real estate;

<sup>1</sup>St. Louis *v.* Wiggin's Ferry Co., 11 Wall. 423; Chicago & N. W. R. R. *v.* Whitton, 13 Wall. 270; Muller *v.* Dows, 94 U. S. 444.

<sup>2</sup>Rev. Stats., § 2319.

<sup>3</sup>North Noonday M. Co. *v.* Orient M. Co. 6 Saw. 299, 316.

<sup>4</sup>McKinley *v.* Wheeler, 130 U. S. 630; followed in Dahl *v.* Montana C. Co., 132 U. S. 264; Thomas *v.* Chisholm, 13 Colo. 105.

<sup>5</sup>Doe *v.* Waterloo M. Co., 70 Fed. 455.

<sup>6</sup>24 Stats. at Large, 477.

yet domestic corporations may freely acquire such lands, and aliens are permitted to own and hold twenty per cent. of the stock of such domestic corporations. Is it to be presumed that in the states wherein the laws make no discrimination between aliens and citizens, with regard to the acquisition and enjoyment of landed estates, that the government should insist that none of the stock of a domestic corporation holding or locating an unpatented mining claim shall be held by an alien, under penalty of being refused a title by patent, if sought, or of suffering escheat after patent, should the government see fit to enforce it? Judge Knowles, in the case above referred to,<sup>1</sup> gives a logical solution of the question. Where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the same state.<sup>2</sup>

A suit may be brought in the federal courts by or against a corporation; but in such case it is regarded as a suit brought by or against the stockholders of a corporation, and for the purposes of jurisdiction it is *conclusively presumed* that *all* the stockholders are citizens of the state which by its laws created the corporation.<sup>3</sup>

In the language of Judge Knowles,—

"Congress was familiar with this rule, and, it seems probable, intended to establish a similar rule under the "mineral land act of 1872."

This view is strengthened by a consideration of the section of the Revised Statutes regulating the proof of citizenship in proceedings under the mining laws.

"Proof of citizenship under this chapter may consist, "in the case of an individual, of his own affidavit thereof; "in the case of an association of persons unincorporated, "of the affidavit of their authorized agent, made on his "own knowledge or upon information and belief; and in "the case of a corporation organized under the laws of "the United States, or of any state or territory thereof, by "the filing of their charter or certificate of incorporation."

<sup>1</sup> Doe v. Waterloo M. Co., 70 Fed. 455.   <sup>2</sup> Muller v. Dows, 94 U. S. 444.

<sup>3</sup> Ohio R. R. v. Wheeler, 1 Black, 250.   <sup>4</sup> Rev. Stats., § 2321.

Under this section, the land department holds that a properly authenticated certificate of incorporation filed by a corporation that is applying for a mineral patent is sufficient proof of citizenship.<sup>1</sup>

It is not within the power of the land department to determine whether such corporation is authorized under its charter to acquire patent for mineral lands.<sup>2</sup>

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign (*i. e.* the state to which it owes its existence) alone can object. It is valid until assailed in a direct proceeding for that purpose.<sup>3</sup>

The supreme court of Montana has held that the fact that an alien owns stock in a corporation which has acquired title to mining claims does not disturb the title of the corporation to such claims.<sup>4</sup>

If it be true that all of the stockholders of a domestic corporation seeking to locate public mineral lands must be citizens, as may be inferred from the ruling of the supreme court of the United States, then a properly authenticated certificate of such corporation is conclusive evidence of such citizenship.<sup>5</sup>

We think we are justified in deducing the rule that within the states domestic corporations may locate and hold mining claims, and that an inquiry as to the citizenship of the stockholders is not permitted, for the simple reason that such citizenship is conclusively presumed. As to the status of such corporations in the territories, we will have occasion to investigate it in a subsequent section.

The supreme court of the United States has suggested the question as to the extent of ground which may be located by a corporation; that is, whether it will be treated

<sup>1</sup> Rose Lode Claim, 22 L. D. 83; Silver King M. Co., 20 L. D. 116; Gen. Min. Circ., par. 76, (see appendix).

<sup>2</sup> Rose Lode Claim, 22 L. D. 83.

<sup>3</sup> National Bank *v.* Matthew, 98 U. S. 621, 628.

<sup>4</sup> Princeton M. Co. *v.* First Nat. Bank, 7 Mont. 530.

<sup>5</sup> Doe *v.* Waterloo M. Co., 70 Fed. 455; Ohio R. R. *v.* Wheeler, 1 Black, 286; Muller *v.* Dows, 94 U. S. 444.



as one person, and is entitled to locate only to the extent permitted to a single individual, or otherwise.<sup>1</sup>

We do not appreciate the embarrassments of the situation as to lode claims, as no one person or association of persons can locate by one location in excess of the statutory limit of fifteen hundred by six hundred feet of surface. As to placers, it might be considered as an association of persons, which it is, and be entitled to locate as such one hundred and sixty acres, if it had eight stockholders, and they usually have many more. The suggested difficulty could be easily overcome by individual stockholders locating and transferring to the corporation. This is the usual method adopted.

§ 227. **Citizenship, how proved.**—Citizenship may be proved like any other fact.<sup>2</sup> It is a question for the jury.<sup>3</sup>

In proceedings before the land department, and in actions brought in the local courts under the sanction of the Revised Statutes<sup>4</sup> to determine the right of possession, the judgment in such actions being advisory to the land department, the law provides that proof of citizenship may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, by the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.<sup>5</sup> However, proof by affidavit is not the only method of establishing citizenship.<sup>6</sup> It may be established by any other competent legal evidence. In fact, in the case of naturalized citizens, some of the courts have insisted that exemplifications of the record of naturaliza-

<sup>1</sup> *McKinley v. Wheeler*, 137 U. S. 630.

<sup>2</sup> *Thompson v. Spray*, 72 Cal. 528.

<sup>3</sup> *Golden Fleece M. Co. v. Cable Cons.*, 12 Nev. 313.

<sup>4</sup> Rev. Stats., § 2326.

<sup>5</sup> Rev. Stats., § 2321; *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 503.

<sup>6</sup> *Thompson v. Spray*, 72 Cal. 528.

tion should be produced,<sup>1</sup> or its loss accounted for, and the foundation laid for the introduction of secondary evidence. This is not the rule in the land department, however, which is governed entirely by the provisions of the Revised Statutes.<sup>2</sup>

In all actions between individuals disconnected with proceedings to obtain title under the federal mining laws, if we may admit that the question of citizenship could in any such action be properly the subject of inquiry,—a proposition we are not prepared to concede,—the rules of evidence prescribed by the several states would control. In such cases, we do not understand that an *ex parte* affidavit would be admissible. The opposing party could not be deprived of the right to cross-examine the witness by whose oath the fact of citizenship is sought to be proved.

It may be here noted, although we shall have occasion to again refer to the subject, that in proceedings before the land department upon applications for patents under the mining laws, proof of citizenship is not required of the original locators or intermediate owners, but of the applicant for patent or adverse claimants only.<sup>3</sup>

It has been said that a presumption of citizenship arises from the fact of residence.

The supreme court of Arizona has held that—

“It will be presumed that a man being a resident of the United States, and who has made a mining location, was a citizen of the United States, . . . where it appears that he recorded at or near the time, a location notice reciting these facts. Such evidence will make out a *prima facie* title.”<sup>4</sup>

This was on the assumption that a location notice, when recorded, is, by reason of the law authorizing or requiring the record, *prima facie* evidence of the facts therein cited,

<sup>1</sup>Wood v. Aspen M. Co., 36 Fed. 25.

<sup>2</sup>In re John Mooney, 3 Copp's L. O. 68; Circ. Instructions, Aug. 2, 1876, *Id.* 68; *Id.*, Dec. 10, 1891, par. 76, (see appendix).

<sup>3</sup>Cash Lode, 1 Copp's L. O. 97; City Rock & Utah r. Pitts, *Id.* 146; Wandering Boy, 2 Copp's L. O. 2.

<sup>4</sup>Jantzen v. Arizona C. Co., 20 Pac. 93, 94.

following the rule approved in Colorado,<sup>1</sup> and other states.<sup>2</sup>

In the opinion of Judge Sawyer, in the class of proceedings provided for by the Revised Statutes,<sup>3</sup> no presumptions of fact should be indulged in, but each party must establish his right by evidence.<sup>4</sup> These presumptions, if properly considered to any extent, are, of course, disputable.

After patent or certificate of purchase has once issued, however, the citizenship of the patentee is conclusively presumed. This presumption arises from the accepted rule that the qualifications of an applicant for patent are necessarily involved in the inquiry made by the land department, and the patent, when issued, is a conclusive adjudication that the patentee possessed the status of a citizen.<sup>5</sup>

We are of the opinion that, as between individuals, the question of the alienage of a locator or claimant of a mining claim can only arise in the proceedings brought before the land department upon application for patent, or in actions brought under section twenty-three hundred and twenty-six of the Revised Statutes. In all other classes of cases, it is not open to question. We have attempted to demonstrate this in a succeeding section.<sup>6</sup>

<sup>1</sup> *Strepey v. Stark*, 7 Colo. 614.

<sup>2</sup> *Flick v. Gold Hill M. Co.*, 8 Mont. 238; *Dillon v. Bayless*, 11 Mont. 171; *Brady v. Husby*, 21 Nev. 453; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53; *Hammer v. Garfield M. & M. Co.*, 130 U. S. 231; *Wood v. Aspen*, 38 Fed. 25.

<sup>3</sup> Rev. Stats., § 2326.

<sup>4</sup> *Bay State S. M. Co. v. Brown*, 19 Saw. 243.

<sup>5</sup> *Justice M. Co. v. Lee*, 21 Colo. 260, overruling the decision of the court of appeals in the same case; *Lee v. Justice M. Co.*, 2 Colo. Ct. App. 112.

<sup>6</sup> See, *post*, § 233.

## ARTICLE II. ALIENS.

§ 231. Acquisition of title to unpatented mining claims by aliens.

§ 232. The effect of naturalization of an alien upon a location made by him at a time when he occupied the status of an alien.

§ 233. What is the legal status of a title to a mining claim located and held by an alien who has not declared his intention to become a citizen?

§ 234. Conclusions.

**§ 231. Acquisition of title to unpatented mining claims by aliens.**—As we have already seen, aliens who have not declared their intention to become citizens can not lawfully locate mining claims upon the public mineral domain. But it frequently occurs that such aliens do so locate such claims and transmit the title so acquired apparently the same as if this disqualification did not exist; and there are innumerable examples of aliens purchasing from citizen locators, and in turn transmitting the title so acquired to others. These facts suggest the following inquiries:—

(1) What is the status of the title to a mining claim located and held by an alien?

(2) What estate may such alien transmit to another?

(3) What is the effect of subsequent naturalization upon a location made at a time when the locator occupied the status of an alien?

(4) What is the status of the title to a mining claim located and held jointly by an alien and a citizen?

In discussing these questions and others incidentally arising out of them, we shall encounter much difficulty in arriving at the true state of the law. The supreme court of the United States, the final arbiter of these problems, has cleared the atmosphere to a limited extent, but the proper solution of some of them remains in doubt, so far as direct adjudication is concerned. When we review the decisions of the courts of last resort in the several states,

we find differences of opinion, diversity of views, and inharmonious conclusions.

This follows necessarily from the fact that the courts of each state act independently of the courts of other states. While all are called upon to construe the same laws in controversies between individuals arising out of rights asserted in public mineral lands, and to a limited degree in their several jurisdictions are auxiliary to the land department in administering these laws, yet no one state is bound by the rules announced by another. Results are reached on independent lines of reasoning. A rule of interpretation announced in one state is directly negated in another; in still another, the rule is accepted in a modified form. Such questions are essentially federal in their nature, and will remain so until the supreme court of the United States finally decides them. But until such ultimate determination is reached, each state is at liberty to construe these laws according to the dictates of its own reason and judgment. Hence the lack of uniformity in the adjudicated law. We shall encounter this unsatisfactory state of affairs in attempting to solve many of the serious problems arising out of the application of these laws to the varied conditions existing in different sections of the mining regions, and we cannot hope in all instances to arrive at correct results. But where we encounter these conflicts of opinion in courts of equal responsibility and learning, we do not think our duty to the profession permits us to rest with a mere statement of the conflicting cases. It will be our endeavor to reach the correct rule, even if in doing so we are compelled to go to the original sources of the law. We are not permitted to arbitrarily announce approval of the decisions of one state or the disapproval of those of another. This would not add to the weight of the decision which meets with our concurrence, nor detract from the value of the one with which we disagree; and unless we are able to found our judgment in logical reasoning, our conclusions will be of no moment. With these preliminary suggestions, we proceed with our

investigations, subdividing the questions involved into different elements, for the purpose of convenient treatment, without regard to the order in which we have heretofore suggested the inquiries involved.

**§ 232. The effect of naturalization of an alien upon a location made by him at a time when he occupied the status of an alien.**—Let us first consider what effect the act of naturalization has upon the estate, if any, acquired by an alien by virtue of a discovery and location of public mineral lands, in all respects valid, except as affected by the alienage of the locator. Let us examine the adjudicated cases on this and analagous subjects, commencing with the rulings of the land department. We note the decisions of the executive department, arranged in chronological order:—

“Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of the alien’s former title.”<sup>1</sup>

“A foreigner may make a mining location and dispose of it, providing he becomes a citizen before disposing of the mine.”<sup>2</sup>

“Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of his former title.”<sup>3</sup>

An alien having made a homestead entry, and subsequently filed his intention to become a citizen, it is held that, in the absence of an adverse claim, the alienage at the time of entry will not defeat the right of purchase.<sup>4</sup>

An alien can acquire no right to public land before filing a declaration of intention to become a citizen, and his subsequent qualification will not relate back so as to defeat an intervening right.<sup>5</sup>

<sup>1</sup> Cash Lode, 1 Copp’s L. O. 97.

<sup>2</sup> Kempton Mine, *Id.* 178.

<sup>3</sup> *In re* Win. S. Wood, 3 Copp’s L. O. 69.

<sup>4</sup> Ole Krogstad, 4 L. D. 564.

<sup>5</sup> *Titamore v. S. P. R. R.*, 10 L. D. 463. This was the case of a pre-emption filing within railroad indemnity limits.

In the case of *Wulff v. Manuel*,<sup>1</sup> Judge De Witt, speaking for the supreme court of Montana, in an able opinion, took the extreme view that an alien could not take title by *purchase* from a citizen locator, and therefore the subsequent naturalization (during a trial involving the alien's right to a patent in a suit upon an adverse claim) could not retroact in favor of such alien. We shall have occasion to refer particularly to this case and the reasoning of the distinguished judge when dealing with the nature of the title acquired and held by an *alien locator*. Undoubtedly, entertaining these views in the case of a purchase by an alien from a citizen locator, the supreme court of Montana would have announced in the hypothetical case under consideration that naturalization could not retroact in favor of an alien locator.

The supreme court of New York has held that naturalization gives the alien all the rights of a natural-born citizen, he thereby becomes capable of receiving property by descent, and of transmitting it in the same way. It also has a retroactive operation, and lands purchased by an alien who is afterwards naturalized may be held by him and transmitted by him in the same manner as lands acquired after naturalization.<sup>2</sup>

The same rule is recognized in Alabama.<sup>3</sup>

Judge Hallett announced his views that, in the absence of any intervening rights, upon declaring his intention to become a citizen of the United States, an alien locator may have the advantage of work previously done and of a record previously made by him in locating a mining claim on the public mineral lands.<sup>4</sup>

And the late Judge Sawyer held that if a locator, even though not a citizen, performed all the acts necessary to make a valid location, and did the work necessary to keep his claim good had he been a citizen, until he conveys to a

<sup>1</sup> 9 Mont. 279.

<sup>2</sup> *Jackson ex dem. Doran v. Green*, 7 Wend. 333.

<sup>3</sup> *Harvey v. State*, 40 Ala. 689.

<sup>4</sup> *Cresus M. & M. Co. v. Colo. L. & M. Co.*, 19 Fed. 78.



citizen, such citizen grantee, taking possession and control, keeping up the monuments and markings, and performing the necessary conditions to keep the claim good, acquires a good and valid right to the claim as against those asserting rights subsequent to such conveyance.<sup>1</sup>

The supreme court of the United States has frequently held that if an alien holding under a purchase becomes a citizen before "office found," that the act of naturalization retroacts to the original acquirement of title, and perfects the title in the alien.<sup>2</sup>

In accordance with this doctrine, that tribunal has held, reversing the supreme court of Montana, that in the case of a purchase by an alien from a qualified locator, the subsequent naturalization retroacted in his favor, removed the infirmity, and entitled him to a patent.<sup>3</sup> The case in which this rule was established involved the right to a patent, the action being instituted under section twenty-three hundred and twenty-six of the Revised Statutes, in which form of action citizenship of the applicant for patent was necessarily involved.

As to the effect of subsequent naturalization upon the title of an original alien locator, while the interest acquired by such location remains in the alien, the supreme court has as yet not determined.

We will reserve the conclusions to be deduced from the foregoing review of authorities until we shall have discussed other important questions arising out of the alienage of locators or purchasers from citizens. Almost all these problems are intimately blended, and it is difficult to isolate them or treat them independently. Our conclusions will be found grouped in section two hundred and thirty-four.

<sup>1</sup> *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299, 315.

<sup>2</sup> *Wulff v. Manuel*, 9 Mont. 279, (citing *Osterman v. Baldwin*, 6 Wall. 122; *Craig v. Radford*, 3 Wheat. 594; *Fairfax v. Hunter*, 7 Cranch, 607; *Gouverneur v. Robertson*, 11 Wheat. 322).

<sup>3</sup> *Manuel v. Wulff*, 152 U. S. 505.

§ 233. What is the legal status of a title to a mining claim located and held by an alien who has not declared his intention to become a citizen?—In the hands of a citizen locator, the estate acquired by a perfected valid location is property in the highest sense of the term; it may be conveyed, mortgaged, taxed, sold on execution, is descendible to heirs, and may be the subject of devise. It is an estate acquired by purchase. Washburn, in his treatise on real property, says.—

"In one thing all writers agree, and that is, in considering that there are two modes only, regarded as classes, of acquiring title to land—namely, *descent* and *purchase*,—purchase including every mode of acquisition known to the law, except that by which an heir on the death of an ancestor becomes substituted in his place as owner by the "act of the law."<sup>1</sup>

"Purchase [said Lord Coke] includes every other method of coming to an estate but merely that by an inheritance, wherein the title is vested in a person, not by his own act or agreement, but by single operation of law."<sup>2</sup>

Purchase denotes any means of acquiring an estate out of the common course of inheritance.<sup>3</sup>

"Certainly, [said the supreme court of Montana,] no one would contend that when a person locates mining ground he acquires a right to the same by descent. He must acquire it, then, by purchase."<sup>4</sup>

But the same court held in a case where an alien purchaser from a citizen locator was endeavoring to obtain a patent (having been naturalized during the trial and prior to judgment), that the parallel of the alien heir claiming by descent and the alien miner claiming under the mining laws was complete as to the principle under consideration, and that such alien was not entitled to hold the estate purchased. In fact, he took nothing.<sup>5</sup> This

<sup>1</sup>3 Washburn on Real Property, 4.

<sup>2</sup>Co. Litt. 18, cited in 2 Black. Com. 241; 2 Bouvier's Law Dict. 403.

<sup>3</sup>2 Black. Com. 242.

<sup>4</sup>Meyendorf v. Frohner, 3 Mont. 282, 320.

<sup>5</sup>Wulff v. Manuel, 9 Mont. 279.

doctrine, however, was denied by the supreme court of the United States.<sup>1</sup>

An estate cast by descent upon one having inheritable blood might certainly be conveyed by purchase to an alien, who might hold until office found. Why should not the estate acquired by an alien from a citizen locator by purchase be subject to the same rule?

Nothing is better settled under the common law than that an alien could take by purchase and hold until deprived of his estate by action of the sovereign, in proceedings called "inquest of office."<sup>2</sup>

Said the supreme court of the United States:—

"By the common law an alien can not acquire real property by operation of law, but may take it by act of the grantor and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceedings which contain the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.' It removes the fact upon which the law divests the estate and transfers it to the government from the region of uncertainty, and makes it a matter of record. It was devised, according to the old law-writers, as an authentic means to give the king his right by solemn matter of record, without which he, in general, could neither take nor part with anything; for it was deemed a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possession upon bare surmises without the intervention of a jury. By the civil law some proceedings equivalent in its substantive features was also essential to take the fact of alienage from being a matter of mere surmise and conjecture and to make it a matter of record. Such a proceeding was usually had before the local magistrate or council, and might be taken at the instance of the government or upon the denouncement of a private citizen."<sup>3</sup>

<sup>1</sup> *Manuel v. Wulff*, 152 U. S. 505.

<sup>2</sup> *Taylor v. Benham*, 5 How. 233; *Fairfax v. Hunter*, 7 Cranch, 603, 618; 2 *Kent's Com.* 54; 1 *Washburn on Real Property*, 49; *People v. Folsom*, 5 Cal. 373; *Territory v. Lee*, 2 Mont. 124, 129; *Racouillat v. Sansevain*, 32 Cal. 376; *De Merle v. Matthews*, 26 Cal. 455.

<sup>3</sup> *Philipps v. Moore*, 100 U. S. 208, 212.

Said the same court, in a previous case, speaking through Justice Johnson:—

"That an alien can take by deed and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It, no doubt, owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. . . . But there is one reason assigned by a very judicious compiler which for its good sense and applicability to the nature of our government makes it proper to introduce it here. I copy it from Bacon. 'Every person,' says he, 'is supposed a natural-born subject that is resident in the kingdom and that owes a local allegiance to the king till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold."<sup>1</sup>

If the government can, by direct conveyance to an alien, vest in him a title to the absolute fee without doing a vain thing, why may not an alien acquire a more limited estate, subject to an inquiry as to his qualifications, when he seeks a conveyance of the ultimate fee?

In *Gouverneur's Heirs v. Robertson*,<sup>2</sup> from which we have heretofore quoted, the grant in question was by the commonwealth of Virginia to Brantz, an alien, his title being assailed by a subsequent grantee from the same commonwealth. The question argued and intended to be exclusively presented was whether a patent for land to an alien was not an absolute nullity. It was there said that the king is a competent grantor in all cases in which an individual may grant, and any person *in esse* and not *ex ditione mortuus* is a competent grantee, *fecies except*, infants, aliens, persons attainted of treason or felony, and many others are expressly enumerated as competent grantees.

In cases of alien locators, the objection suggests itself that the government does not *grant*; there is no act done

<sup>1</sup> *Doe ex dem. Gouverneur's Heirs v. Robertson*, 11 Wheat, 332.

<sup>2</sup> 11 Wheat, 332, 355.

or performed by it prior to the issuance of a patent. The alien accepts an invitation which was not extended to him, but was exclusively confined to others, and attempts by his own act to create the relationship of grantor and grantee.

The reply to this is: A citizen obtains the grant by his own act; that is, by complying with the provisions of the law laid down by the paramount proprietor. The lands are the property of the government. It alone has the power to object and inquire into the qualifications of the locator. "With a regard to the peace of society and a "desire to protect the individual from arbitrary aggression," the government reserves to itself the right to inquire into these qualifications. For this purpose, at least, the presumption indulged in by Bacon, quoted by the supreme court of the United States (*supra*), "that every "person is supposed a natural-born subject that is resident "in the kingdom and that owes allegiance to the king, till "the contrary be found by office," as well as those mentioned in a preceding section,<sup>1</sup> may be invoked for the purpose of preserving the estate from invasion, "upon base "surmises without the intervention of a jury."

It has been authoritatively determined by the supreme court of the United States, that the estate created by a perfected mining location and transferred to an alien is not analagous to an estate created by descent; in other words, that it is not an estate created by operation of law.<sup>2</sup>

We think we are justified in asserting that the following principles have been established by the weight of authority:—

(1) That a location made by an alien, if otherwise valid, creates in him an estate which can be divested only at the instigation of the government in a proceeding to which it is either directly or indirectly a party;

(2) That such estate when vested in a citizen is as complete as if originally acquired by him by location, and no one, not even the government, can assail his title.

<sup>1</sup>See, *ante*, § 227.

<sup>2</sup>*Manuel v. Wulff*, 152 U. S. 505.

While the supreme court of the United States was extremely guarded in its decision in *Manuel v. Wulff* (*supra*), and avoided any intimation that a transfer from an alien locator to an alien would be considered as vesting any estate, yet its use of the term "qualified locator" was simply a statement of the fact in that particular case, as there was no controversy over the qualification of the locator. He was an admitted citizen. It was not necessary, nor did the court propose, inferentially or otherwise, to rule upon a state of facts not before it.

But the circuit court of appeals of the eighth circuit has distinctly held, in a case where an alien was one of the locators, that mining rights acquired by such alien by his location constitute no exception to the general rule, that the right to defeat a title on the ground of alienage is reserved to the government alone.<sup>1</sup>

And Judge James H. Beatty, in a recent case tried before him as circuit judge, ninth circuit, thus charged the jury in an action of trespass:—

"As a general rule, it is true that citizens only of the United States can locate mining claims, but it has been held by the supreme court," which is, of course, our guide, "that this is a question that can be asserted or claimed only by the government. In a contest between individuals, as in this case, which is an action of ejectment, that question does not arise; but when a party applies for a patent, the government is interested, and in a case of that kind the citizenship of the parties must be shown before the party would be entitled to a patent. But this is not an action for a patent. It is an action of ejectment for the possession of that ground, and I instruct in this case that that question can not be considered. It is only for the government to make that objection on the ground of non-citizenship."<sup>2</sup>

In the case of *Cresus M. & M. Co. v. Colorado L. & M. Co.*<sup>3</sup> it was contended that any one, citizen or alien, might

<sup>1</sup> *Billings v. Aspen M. Co.*, 51 Fed. 338, 341; S. C., on rehearing, 52 Fed. 250.

<sup>2</sup> We infer that the case of *Manuel v. Wulff*, 152 U. S. 503, is referred to.

<sup>3</sup> *Little Emily M. & M. Co. v. Couch* (unreported).

<sup>4</sup> 13 Fed. 78.



make a location, and the competency of the latter can not be questioned except by the government; that a location made by an alien who had not declared his intention to become a citizen should be maintained until the government avoids it.

But Judge Hallett declined to pass upon the question, as the alien locator had become naturalized prior to the acquisition of any intervening rights.

When we come to analyze the decisions of other tribunals in the quest of apt analogies, we find much conflict of opinion. We deem it important to review them.

Judge Sawyer, in the ninth circuit court, held that if a citizen and an alien jointly locate a claim, not exceeding the amount of ground allowed by law to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen gives a valid title.<sup>1</sup>

The supreme court of Nevada has intimated that a mining claim located by an alien might be relocated and held by a citizen.<sup>2</sup>

The same court also announced that an alien should be protected in the possession of the public lands the same as a citizen;<sup>3</sup> but, in the light of its other rulings, there is but little doubt that it entertained the view that a location made by an alien was not protected from a peaceful entry by a citizen for the purpose of relocating, and that such relocation would connect the relocater with the government title.

That an alien may purchase an unpatented mining claim, and has full and complete right to convey the same, his estate being valid against every person but the government, has been determined in several of the states.<sup>4</sup>

A contrary rule was at one time asserted by the supreme court of Montana, that court holding that a possessory title of mineral land, founded on a valid location, and held by

<sup>1</sup>North Noonday M. Co. v. Orient M. Co., 6 Saw. 299.

<sup>2</sup>Golden Fleece G. & S. M. Co. v. Cable Cons., 12 Nev. 313.

<sup>3</sup>Courtney v. Turner, 12 Nev. 345.

<sup>4</sup>Ferguson v. Neville, 61 Cal. 356; Gorman v. Alexander, 2 S. Dak. 557; Territory v. Lee, 2 Mont. 124.



compliance with local mining laws may be transferred from one to another, so long as it does not pass into the hands of one incapable of acquiring complete title, in which latter case the grant reverts to the government, and the land becomes subject to relocation.<sup>1</sup>

But the doctrine of this case was denied by the supreme court of the United States.<sup>2</sup>

In a case where alien Chinese were in possession of public mineral lands in Oregon, Judge Dady issued an injunction, at the suit of citizens who had located such lands while in the occupancy of the Chinese; but it does not appear from the report of the case that the Chinese claimed to be in possession under any location made by them or others through whom they entered. In addition, some stress was laid upon the inhibition of the constitution of that state, that "No Chinaman not a resident of the state at the adoption of this constitution shall ever hold any real estate or mining claim, or work any mining claim therein."

In California, the question is incidentally discussed in several cases, brought under the provisions of section twenty-three hundred and twenty-six of the Revised Statutes, to determine a right to a patent. We quote from the opinion of that court —

"It would seem to follow that as the right to possession and the right to a patent are made to depend upon citizenship, the complaint which forms the basis upon which these rights are supported should show the plaintiffs to possess those qualifications without which the judgment they seek and the consequences to flow from that judgment cannot be reached. Where a right is conferred upon a particular class of persons, or by reason of possessing some special qualification or status, he who claims such a right must show himself to belong to the class designated or to possess the qualification prescribed or the status mentioned as the basis of the right."

But the court was careful to add:—

"We must not be understood as holding that in all actions in relation to mining claims it is necessary for plaintiffs

<sup>1</sup> *Tibbitts v. Ah Tong*, 4 Mont. 536. <sup>2</sup> *Manuel v. Wulff*, 152 U. S. 505.

“to aver citizenship. We are discussing the requirements of a complaint in the special case provided by the act of congress to determine the right of possession of a mining claim under the laws of congress, in which the successful party becomes entitled on the judgment-roll to apply for patent—a case in which the parties must connect themselves with the title of the government, and show compliance with the acts of congress, and our conclusions are limited to such action.”<sup>1</sup>

The action provided for by section twenty-three hundred and twenty-six of the Revised Statutes is undoubtedly equivalent in its legal effect to “inquest of office.” Each party is called upon to establish his qualifications to receive patent, and the question of citizenship is a material one. In this class of actions, the courts have generally insisted that citizenship of the litigating parties must be alleged, and, of course, proved.<sup>2</sup>

In ordinary actions, some courts hold that this is not necessary.<sup>3</sup> Others hold that in all classes of actions such citizenship must be averred.<sup>4</sup> Still others dispense with the necessity of alleging, but insist upon its being proved.<sup>5</sup>

The supreme court of the United States has decided that an objection to the alienage of a locator can not be taken for the first time in the appellate court.<sup>6</sup> As this was a suit upon an adverse claim, citizenship should have been alleged in the pleadings.

Judge Sawyer has decided that the citizenship of a locator through whom a party litigant claimed must be

<sup>1</sup> *Lee Doon v. Tesh*, on rehearing in bank, 68 Cal. 43. For opinion rendered by department, see 6 Pac. 97.

<sup>2</sup> *Jackson v. Dines*, 13 Colo. 90; *McFeters v. Pierson*, 15 Colo. 201; *Lee Doon v. Tesh*, 68 Cal. 43; *Keeler v. Trueman*, 15 Colo. 143; *Rosenthal v. Ives*, 2 Idaho, 244.

<sup>3</sup> *McFeters v. Pierson*, 15 Colo. 201; *Lee Doon v. Tesh*, 68 Cal. 43; *Thompson v. Spray*, 72 Cal. 528; *Moritz v. Lavelle*, 77 Cal. 10.

<sup>4</sup> *Bohanon v. Howe*, 2 Idaho, 417; *Ducie v. Ford*, 8 Mont. 233.

<sup>5</sup> *Altoona Q. M. Co. v. Integral Q. M. Co.*, 45 Pac. 1047 (Cal.).

<sup>6</sup> *O'Reilly v. Campbell*, 116 U. S. 418. See, also, *Jackson v. Dines*, 13 Colo. 90.

shown in an action of trespass;<sup>1</sup> and this rule was followed by the supreme court of the state of California.<sup>2</sup>

§ 234. **Conclusions.**— Out of the chorus of discordant sounds it is difficult to evolve harmony.

We think, however, that, considering the underlying principles which should govern the construction and administration of the law, the weight of authority, as well as motives of public policy, we are justified in deducing the following conclusions on the subject of alienage as affecting titles to unpatented mining claims on the public domain:—

(1) An alien may locate or purchase a mining claim, and until "inquest of office" may hold and dispose of the same in like manner as a citizen;

(2) Proceedings to obtain patents are in the nature of "inquest of office," and in such proceedings citizenship is a necessary and material fact to be alleged and proved;

(3) In all other classes of actions between individuals with which the government has no concern, citizenship is not a fact in issue; it need be neither alleged nor proved;

(4) Naturalization of an alien at any time subsequent to either location or purchase is retroactive and enables him to proceed to patent. The antecedent bar to patent by reason of his alienage is removed.

These conclusions are not altogether palatable, but we consider that they are forced upon us by the logic of the law.

There is only one limitation upon these conclusions which may be plausibly asserted, and that is this: A qualified locator may relocate a claim in the possession of an alien who has not declared his intention to become a citizen, if such relocation may be made without force or violence and prior to the naturalization of the alien, as the

<sup>1</sup> *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299.

<sup>2</sup> *Anthony v. Jilison*, 83 Cal. 296; *Altoona Q. M. Co. v. Integral Q. M. Co.*, 45 Pac. (Cal.) 1047.

“to aver citizenship. We are discussing the requirements of a complaint in the special case provided by the act of congress to determine the right of possession of a mining claim under the laws of congress, in which the successful party becomes entitled on the judgment-roll to apply for patent—a case in which the parties must connect themselves with the title of the government, and show compliance with the acts of congress, and our conclusions are limited to such action.”<sup>1</sup>

The action provided for by section twenty-three hundred and twenty-six of the Revised Statutes is undoubtedly equivalent in its legal effect to “inquest of office.” Each party is called upon to establish his qualifications to receive patent, and the question of citizenship is a material one. In this class of actions, the courts have generally insisted that citizenship of the litigating parties must be alleged, and, of course, proved.<sup>2</sup>

In ordinary actions, some courts hold that this is not necessary.<sup>3</sup> Others hold that in all classes of actions such citizenship must be averred.<sup>4</sup> Still others dispense with the necessity of alleging, but insist upon its being proved.<sup>5</sup>

The supreme court of the United States has decided that an objection to the alienage of a locator can not be taken for the first time in the appellate court.<sup>6</sup> As this was a suit upon an adverse claim, citizenship should have been alleged in the pleadings.

Judge Sawyer has decided that the citizenship of a locator through whom a party litigant claimed must be

<sup>1</sup> *Lee Doon v. Tesh*, on rehearing in bank, 68 Cal. 43. For opinion rendered by department, see 6 Pac. 97.

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<sup>3</sup> *McFeters v. Pierson*, 15 Colo. 201; *Lee Doon v. Tesh*, 68 Cal. 43; *Thompson v. Spray*, 72 Cal. 528; *Moritz v. Lavelle*, 77 Cal. 10.

<sup>4</sup> *Bohanon v. Howe*, 2 Idaho, 417; *Ducie v. Ford*, 8 Mont. 233.

<sup>5</sup> *Altoona Q. M. Co. v. Integral Q. M. Co.*, 45 Pac. 1047 (Cal.).

<sup>6</sup> *O'Reilly v. Campbell*, 116 U. S. 418. See, also, *Jackson v. Dines*, 13 Colo. 90.

shown in an action of trespass;<sup>1</sup> and this rule was followed by the supreme court of the state of California.<sup>2</sup>

§ 234. **Conclusions.**— Out of the chorus of discordant sounds it is difficult to evolve harmony.

We think, however, that, considering the underlying principles which should govern the construction and administration of the law, the weight of authority, as well as motives of public policy, we are justified in deducing the following conclusions on the subject of alienage as affecting titles to unpatented mining claims on the public domain:—

(1) An alien may locate or purchase a mining claim, and until “inquest of office” may hold and dispose of the same in like manner as a citizen;

(2) Proceedings to obtain patents are in the nature of “inquest of office,” and in such proceedings citizenship is a necessary and material fact to be alleged and proved;

(3) In all other classes of actions between individuals with which the government has no concern, citizenship is not a fact in issue; it need be neither alleged nor proved;

(4) Naturalization of an alien at any time subsequent to either location or purchase is retroactive and enables him to proceed to patent. The antecedent bar to patent by reason of his alienage is removed.

These conclusions are not altogether palatable, but we consider that they are forced upon us by the logic of the law.

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alien might be deemed a mere occupant without color of title, and the rules announced in the article on "occupancy" might apply.<sup>1</sup> The relocater is then in a position to contest the alien's right to a patent. He would have the status of an adverse claimant, without which he would have no standing in court. The alienage of the original locator would not avail the subsequent citizen locator so as to permit the court to award the claim to him for that reason; but the latter would be enabled through the patent proceedings, which are the equivalents of "inquests of office," to have alienage established, and thus clear the records. But in other actions, such as trespass, ejectment, and the like, disconnected with patent proceedings, and to which the government is neither directly nor indirectly a party, the alien locator would be entitled to rest upon the presumption as to his citizenship, and the fact that only the government could complain. We are loath to believe that a location by an alien is, under all circumstances, such a segregation of the tract from the body of the public domain as will inhibit a relocation by a qualified locator who enters peaceably and in good faith for that purpose.

### ARTICLE III. GENERAL PROPERTY RIGHTS OF ALIENS IN THE STATES.

§ 237. After patent, property becomes subject to rules prescribed by the state.

§ 238. Constitutional and statutory regulations of the precious-metal-bearing states on the subject of alien proprietorship.

**§ 237. After patent, property becomes subject to rules prescribed by the state.** — The rights of aliens to acquire, hold, and transmit real property in the states, after the title to such property has passed out of the general government, are regulated exclusively by the constitution and laws of the several states.

<sup>1</sup>See, *ante*, art. x., §§ 216-218.

The mining laws contain the express provision that nothing in them shall be construed to prevent the alienation of title conveyed by a patent to any person whatever.<sup>1</sup>

As we have heretofore observed,<sup>2</sup> property in mines, once vested absolutely in the individual, becomes subject to the same rules of law as other real property within the state. The federal law remains a muniment of title, but beyond this it possesses no potential force. Its purpose has been accomplished, and, like a private vendor, the government loses all dominion over the thing granted. To determine, therefore, what disabilities, if any, are imposed upon aliens as to property in the states, held in absolute private ownership after the government has absolutely parted with its title, the constitution and laws of the several states must be consulted.

§ 238. **Constitutional and statutory regulations of the precious-metal-bearing states on the subject of alien proprietorship.**—The tendency in almost all the precious-metal-bearing states, and those within the purview of this treatise, has been in the line of a liberal policy on the subject of alien ownership. For the purpose of convenient reference, we note the present status of aliens in the several states.

*California.*—Aliens, either resident or non-resident, may take, hold, and dispose of property, real or personal.<sup>3</sup> A non-resident foreigner may take by succession, but must claim the estate within five years from the death of the decedent to whom he claims succession.<sup>4</sup>

*Colorado.*—Resident aliens may acquire, inherit, possess, enjoy, and dispose of property, real and personal, as native-born citizens.<sup>5</sup>

<sup>1</sup> Rev. Stats., § 2326.

<sup>2</sup> See, *ante*, § 22.

<sup>3</sup> Civil Code, § 671; *Estate of Billings*, 65 Cal. 593; *Lyons v. State*, 67 Cal. 380; *Carrasco v. State*, *Id.* 385; *State v. Smith*, 70 Cal. 153.

<sup>4</sup> Civil Code, § 1404.

<sup>5</sup> Const., art. ii., § 27; *Mills' Annot. Stats.* 1891, ch. iii., § 99, p. 421.

*Idaho.*—An act of the legislature of this state provides as follows:—

“That any person, whether citizen or alien (except as hereinafter provided), natural or artificial, may take, hold, and dispose of mining claims and mining property, real or personal, tunnel rights, millsites, quartz-mills and reduction works, used or necessary or proper for the reduction of ores, and water rights used for mining or milling purposes, and any other lands or property necessary for the working of mines or the reduction of the products thereof; *provided*, that Chinese, or persons of Mongolian descent not born in the United States, are not permitted to acquire title to land or any real property under the provisions of this act.”<sup>1</sup>

The rule as to other classes of real estate is different.<sup>2</sup>

*Montana.*—Aliens and denizens have the same right as citizens to acquire, purchase, possess, enjoy, convey and transmit, and inherit mines and mining property, and milling, reduction, concentrating, and other works, and real property necessary for or connected with the business of mining and treating ores and minerals.<sup>3</sup>

*Nebraska.*—No distinction is made between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property.<sup>4</sup> But non-resident aliens and corporations not incorporated under the laws of the state are prohibited from acquiring title to or taking or holding any lands or real estate by descent, devise, purchase, or otherwise. Exception is made in favor of a widow and heirs of aliens who acquired lands prior to the adoption of the constitution. These may hold by devise or descent for a period of ten years; but within that period they must be sold to a *bona fide* purchaser, or suffer escheat.<sup>5</sup>

*Nevada.*—Any non-resident alien, person or corporation, except subjects of the Chinese empire, may take, hold, and enjoy any real property, or any interest in lands, tenements,

<sup>1</sup> Idaho Stats., 1890-91, p. 118.    <sup>4</sup> Const., art. i., § 25.

<sup>2</sup> *Id.* 108.

<sup>5</sup> Comp. Stats. Neb. 1893, ch. lxxiii. § 70.

<sup>3</sup> Const., art. iii., § 25.

or hereditaments within the state of Nevada, as fully, freely, and upon the same terms and conditions as any resident, citizen, person, or domestic corporation.<sup>1</sup>

*North Dakota.*—Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state.<sup>2</sup>

*Oregon.*—“No Chinaman, not a resident of the state at the adoption of this constitution, shall ever hold any real estate or mining claim, or work any mining claim therein.”<sup>3</sup>

Aliens may acquire and hold lands or interest therein, by purchase, devise, or descent, the same as if they were native-born citizens. Foreign corporations not prohibited by the constitution from carrying on business in the state may acquire, hold, use, and dispose of all real estate necessary or convenient to carry into effect the objects of its organization, and also any interest in real estate, by mortgage or otherwise, as security for moneys due or loans made by such corporation.<sup>4</sup>

*South Dakota.*—The constitution of this state provides that:—

“No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property.”<sup>5</sup>

Legislation as to non-resident aliens is permissive, but there is no statute on the subject. Hence non-resident aliens occupy the status of citizens or resident aliens, with reference to the acquisition and enjoyment of property.

*Washington.*—It is provided by the laws of this state that—

“Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto

<sup>1</sup> Gen. Stats. Nev. 1885, § 2655, p. 680.      <sup>4</sup> Hill's Annot. Stats. 1892, § 2988.

<sup>2</sup> Rev. Code 1895, § 3277, p. 722.

<sup>5</sup> Const., art. vi., § 14.

<sup>3</sup> Const., art. xv., § 8.

“ or interest therein, by purchase, devise, or descent, and  
 “ he may convey, mortgage, and devise the same, and if he  
 “ die intestate, the same shall descend to his heirs; and in  
 “ all cases such lands shall be held, conveyed, mortgaged,  
 “ or devised, or shall descend in like manner and with like  
 “ effect as if such alien were a citizen of this state or of the  
 “ United States.”<sup>1</sup>

*Wyoming.*— There is no distinction between aliens and citizens, with reference to property rights.<sup>2</sup>

*Utah.*— While Utah was still a territory, it was subject to the alien act of congress. There is nothing in its recently adopted constitution or its laws discriminating between citizens and aliens on the question of property rights. The territorial statute regulating the right of aliens to take by succession, requiring them to claim their inheritance within five years,<sup>3</sup> is still in force, by virtue of its constitution.<sup>4</sup>

#### ARTICLE IV. GENERAL PROPERTY RIGHTS OF ALIENS IN THE TERRITORIES.

§ 242. Power of congress over the territories.

§ 243. The alien act of March 3, 1887, and the territorial limit of its operation.

§ 244. General scope of the alien act—Opinion of Attorney-General Garland.

**§ 242. Power of congress over the territories.**— The power of congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States.<sup>5</sup>

<sup>1</sup> Hill's Stats. and Codes 1891, vol. i., § 2955.

<sup>2</sup> Const., art. i., § 29.

<sup>3</sup> Laws 1884, p. 77, § 20.

<sup>4</sup> Art. xxiv., § 2.

<sup>5</sup> Justice Bradley, in *Mormon Church v. United States*, 136 U. S. 1, 42.

As was said by Chief Justice Marshall,—

“Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.”<sup>1</sup>

And by Chief Justice Waite,—

“Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people under the constitution of the United States may do for the states.”<sup>2</sup>

These propositions are elementary and self-evident.<sup>3</sup>

§ 243. **The alien act of March 3, 1887, and the territorial limit of its operation.**—Congress having this unquestioned power to establish rules of property in the territories, on March 3, 1887, passed an act entitled “An act to restrict the ownership of real estate in the territories to American citizens,”<sup>4</sup> the first two sections of which are as follows:—

“SEC. 1. That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some state or territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States, or in the District of

<sup>1</sup> American Ins. Co. v. Canter, 1 Peters, 511, 542.

<sup>2</sup> National Bank v. Co. of Yankton, 101 U. S. 129, 133.

<sup>3</sup> Mormon Church v. United States, 136 U. S. 1, 43.

<sup>4</sup> 24 Stats. at Large, 476.

“Columbia, except such as may be acquired by inheritance  
 “or in good faith in the ordinary course of justice in the  
 “collection of debts heretofore created; *provided*, that the  
 “prohibition of this section shall not apply to cases in  
 “which the right to hold or dispose of lands in the United  
 “States is secured by existing treaties to the citizens or  
 “subjects of foreign countries, which rights, so far as they  
 “may exist by force of any such treaty, shall continue to  
 “exist so long as such treaties are in force, and no longer.

“SEC. 2. That no corporation or association more than  
 “twenty per centum of the stock of which is or may be  
 “owned by any person or persons, corporation or corpora-  
 “tions, association or associations, not citizens of the United  
 “States, shall hereafter acquire, or hold or own any real  
 “estate hereafter acquired in any of the territories of the  
 “United States or of the District of Columbia.”

By section four the attorney-general is directed to enforce the forfeitures provided for by the act, by bill in equity or other proper process.

Whatever legislation theretofore existed in any of the territories upon the subject of alienage, it became inoperative and ineffectual, and thenceforward had no potential existence. Since the passage of this act, all of the then organized territories except New Mexico and Arizona have been admitted into the union. Unquestionably, the alien act is in force in these territories, and will so remain until it is repealed or they are admitted to statehood. Does the act apply to Alaska?

The act prohibits persons not citizens or who have not lawfully declared their intention to become such, and corporations not created by or under the laws of some state or territory of the United States, from hereafter acquiring, holding, or owning real estate so hereafter acquired, or any interest therein, in any of *the territories of the United States or in the District of Columbia*.

Was Alaska a territory at the time this act was passed, within the meaning of the law? Popularly, it has never been so considered. By the act of July 27, 1868,<sup>1</sup> it was created a customs district, and called the *District of Alaska*.

<sup>1</sup> 15 Stats. at Large, 240.



It has been referred to in some of the legislation of congress as an *unorganized territory*<sup>1</sup> By the act passed March 17, 1884, entitled "An act providing a civil government for Alaska,"<sup>2</sup> it is created a civil, judicial, and land district, and throughout the entire act it is referred to and denominated as a *district*. This act does not clothe the "district" with legislative functions. It establishes a temporary seat of government at Sitka, and authorizes the appointment of a governor, district judge, and minor officers. The general laws of the state of Oregon in force at the date of the passage of the act are declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of the act or the laws of the United States. It is expressly provided that nothing contained in the act should put in force in said district the general land laws of the United States. But the laws relating to mining claims and rights incident thereto were declared thenceforward to be in force in said district. These laws, as we have heretofore observed,<sup>3</sup> embody a provision that nothing therein contained should be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.<sup>4</sup>

This was the political status of Alaska when the alien act was passed in 1887, and is substantially its status at the present time. Was it included within the designation "territories" mentioned in the alien act? We are of opinion that it was not. We think we are materially aided in this view by a decision of the supreme court of the United States with reference to that portion of Indian territory now known as Oklahoma, prior to its organization into a territory. The decision referred to was based upon the following state of facts:—

On February 9, 1889, congress passed an act<sup>5</sup> providing—

"That every person who shall carnally and unlawfully know any female under the age of sixteen years, or who

<sup>1</sup> Rev. Stats., ch. in., p. 342.

<sup>2</sup> 23 Stats. at Large, 24.

<sup>3</sup> See, *ante*, § 237.

<sup>4</sup> Rev. Stats., § 2326.

<sup>5</sup> 25 Stats. at Large, 658.

“ shall be accessory to such carnal and unlawful knowledge  
 “ before the fact in the District of Columbia or other place,  
 “ *except the territories*, over which the United States has ex-  
 “ clusive jurisdiction, . . . shall be guilty of a felony.”

The accused was charged with having committed the offense within that part of Indian territory commonly known as Oklahoma. He was tried and convicted, and applied to the supreme court of the United States for a writ of *habeas corpus*, his counsel contending that Oklahoma was a *territory* within the exception of the act of congress, and that the trial court was without jurisdiction. The supreme court, in denying the writ, thus expressed its views:—

“ We think the words ‘except the territories’ have refer-  
 “ ence exclusively to that system of organized government  
 “ long existing within the United States by which certain  
 “ regions of the country have been erected into civil gov-  
 “ ernments. These governments have an executive, a legis-  
 “ lative, and a judicial system. They have the powers  
 “ which all these departments of government have exer-  
 “ cised, which are conferred upon them by act of congress,  
 “ and their legislative acts are subject to the disapproval of  
 “ the congress of the United States. . . . It is this class  
 “ of governments, long known by the name of territories,  
 “ that the act of congress excepts from the operations of  
 “ this statute. . . . Oklahoma was not of this class of  
 “ territories. It had no legislative body. It had no gov-  
 “ ernment. It had no established or organized system of  
 “ government for the control of the people within its lim-  
 “ its, as the territories of the United States have, and  
 “ always have had. We are, therefore, of opinion that the  
 “ objection taken on this point by the counsel for the  
 “ prisoner is unsound.”<sup>1</sup>

Suppose the crime in question had been committed in Alaska. Is there any reason for holding that a valid conviction could not have been had, for lack of jurisdiction?

It seems to us that the inference is logically deducible that the alien act under consideration is not applicable to Alaska, and that after patent the patentee may transfer his title to “any person whatever.” Of course, as to unpatented

<sup>1</sup> *In re Lane*, 135 U. S. 443, 447.

mines, the rule is the same in all sections of the country, states or territories, organized and unorganized. One not a citizen, or not having declared his intention to become such, strictly speaking, may not locate a mining claim anywhere upon the public domain, as already explained in a preceding article.<sup>1</sup>

As to Oklahoma, it became an organized territory by act of congress, passed subsequent to the enactment of the alien laws.<sup>2</sup>

It might be well doubted if these laws became operative upon the formal creation of the territory, *propria vigore*. The language of the first section might be construed to include only such territories as were then organized. The legislature of Oklahoma has legislated only upon the right of aliens to take by succession.

In New Mexico, there does not seem to have been any legislation prior to the passage of the alien act of congress.

In Arizona, at the time that act was passed a territorial law was in existence which provided that any alien might acquire by purchase or operation of law, and possess, hold, own, and dispose of any mines or minerals within the territory.<sup>3</sup>

The passage of the alien act, however, superseded this; and in the revision of the laws of Arizona the former territorial act was omitted.

In these two last-named territories the congressional act is, of course, in full force.

**§ 244. General scope of the alien act — Opinion of Attorney-General Garland.**—Shortly after the passage of the alien act, the president of the United States submitted to Attorney-General Garland the following inquiries with reference to the alien act, for his official investigation and opinion —

(1) Was the act intended to and does it apply to mines?

<sup>1</sup> See, *ante*, § 231.

<sup>2</sup> May 2, 1890, 26 Stats. at Large, 81.

<sup>3</sup> Laws 1885, 40.

(2) Can aliens lawfully acquire, own, and hold shares or stock issued by an American corporation which is the owner of mineral lands in the territories? •

(3) Would the advancement of money by aliens for the purpose of developing mining properties be lawful under the act?

(4) Can aliens lawfully contract with American owners for working mines or making any proper use of mineral lands for a term of years?

The conclusions reached by the attorney-general were thus stated by him:—

(1) As mines are real estate, or inheritable interests in real estate, the act does apply to them; .

(2) As stock in a corporation is personalty, an alien can lawfully have, own, and hold shares of stock issued by an American corporation which was at the date of the passage of the act the owner of mineral lands in territories; but if the holding of aliens exceeds twenty per cent., such corporation can neither acquire, hold, nor own, nor hereafter acquire, real estate while more than twenty per cent. of stock is held and owned by aliens;

(3) Under the act, the advancement of money hereafter by aliens for the purpose of developing mining property is lawful; but no interest in the real estate can be acquired by such advancement, nor would an alien have the right to purchase the real estate nor any interest therein on a loan made since the passage of the act, even if sold on his own security or lien;

(4) Aliens may lawfully contract with American owners to work mines, by personal contracts for hire, or by *bona fide* leases for a reasonable time.<sup>1</sup>

The foregoing opinion, emanating from the head of the department of justice, is entitled to great weight. The conclusions are logically drawn, with, perhaps, one exception. The attorney-general expressed the view that a leasehold

<sup>1</sup> 14 Copp's L. O. 126, 127.

was not an interest in property, but should be treated as a chattel real, and that a lease for years was not "real estate," within the meaning of the law.

This rule is not in harmony with the decisions of many of the States. But, be that as it may, there can be no question but that alien individuals and corporations may contract with American mine-owners to work and develop mining properties, and receive any proportion of the output which may be agreed upon as compensation for services rendered and expenditures made in connection with the venture. Contracts of the character called "tribute," or "beneficiating," contracts, do not create an interest in property.

As was said by the supreme court of California,—

"Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is in all its essential features a contract for labor to be performed, and to be paid for by a share of the profits realized from such labor."<sup>1</sup>

"Tribute," or "beneficiating," contracts are clearly not within the inhibition of the law.

As to alien ownership of shares of stock in a domestic corporation owning real estate in the territories, it would seem, from a consideration of the authorities cited in a previous section, that citizenship of such stockholders is presumed.<sup>2</sup>

If such presumption is not in this particular instance a conclusive one, it certainly is *prima facie*, and the burden of proof would rest upon the government, in case "inquest of office" should be sought.

In applications for patent by corporations for mining claims in the territories, the land department requires, in addition to the certificate of incorporation, an affirmative showing that no more than twenty per cent. of the stock is held by aliens. Stockholders of a corporation are those

<sup>1</sup> *Hudepohl v. Liberty Hill Cons. M. Co.*, 80 Cal. 553; *Stuart v. Adams*, 89 Cal. 367.

<sup>2</sup> See, *ante*, § 226.

registered upon its books as such. It is not likely that such registry would show the political status of the stockholder. They may be all citizens in the original instance. And as the stock passes from hand to hand by indorsement, the corporation itself will not be able to trace it. Nor is it necessary that it should. Its acts are controlled entirely by the registered stock. Those in whose names the stock is recorded on the books of the corporation are the only stockholders recognized by the law. So far as the practical operation of the law in this respect is concerned, it is a dead letter.

Of course, aliens and corporations would, in any event, hold until "office found." We are not aware of a single instance where the government has intervened and sought to enforce the forfeitures provided for by the act.

With the admission of the remaining organized territories into the union, which will undoubtedly occur in the near future, the alien act of congress will become obsolete.

## **TITLE IV.**

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### **STATE LEGISLATION AND LOCAL DISTRICT REGULATIONS SUPPLEMENTING THE CONGRESSIONAL MINING LAWS.**

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#### **CHAPTER**

- I. STATE LEGISLATION SUPPLEMENTAL TO THE CON-  
GRESSIONAL MINING LAWS.**
- II. LOCAL DISTRICT REGULATIONS.**





## CHAPTER I.

### STATE LEGISLATION SUPPLEMENTAL TO THE CONGRESSIONAL MINING LAWS.

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|---|--|
| § 248. Introductory.  | § 254. Mining as a "public use."   |
| § 249. Limits within which state may legislate.   | § 255. Rights of way for pipe-lines for the conveyance of oil and natural gas.       |
| § 250. Scope of existing state and territorial legislation—Subjects concerning which states and territories may unquestionably legislate. | § 256. Lateral and other railroads for transportation of mine products.              |
| § 251. Subjects upon which states have enacted laws the validity of which is open to question.  | § 257. Physical and industrial conditions as affecting the rule of "public utility." |
| § 252. Drainage, easements, and rights of way for mining purposes.  | § 258. The rule in Nevada.   |
| § 253. Provisions of state constitutions on the subject of eminent domain.  | § 259. The rule in Arizona.  |
|   | § 260. The rule in Georgia.  |
|   | § 261. The rule in Pennsylvania.   |
|   | § 262. The rule in West Virginia.  |
|   | § 263. The rule in California.   |
|   | § 264. Conclusions.  |

§ 248. **Introductory.**—As preliminary to the analysis and general exposition of the law regulating the manner in which mining rights on the public mineral lands may be held, enjoyed, and perpetuated, it is appropriate that we define with reasonable certainty the limit and extent of legislative power conceded to the several states and territories by the express or implied sanction of the general government. We have heretofore shown that the federal system of mining law is composed of three elements:—

- (1) The legislation of congress,
- (2) The legislation of the various states and territories

supplementing congressional legislation, and in harmony therewith;

(3) Local rules and customs, or regulations established in different localities, not in conflict with federal legislation or that of the state or territory wherein they are operative.<sup>1</sup>

We have traced the evolution of this system through the different periods of our national history, from the embryotic stage, which had its genesis in the local rules and customs of the mining camps of the west, to the development of higher forms of law. While in this progressive development the primitive forms have not altogether disappeared, they have been relegated from the position of controlling importance to that of mere subordinate and subsidiary functions. It is entirely unnecessary to here retrace the steps by which the present results were obtained. In the early chapters of this treatise,<sup>2</sup> we have endeavored to present such an historical review as will suffice for all practical purposes and enable the student to acquaint himself with the process of crystallization which has given us as a resultant the existing unique system. We are immediately concerned with the present practical operation of this system, and need not here stop by the wayside to indulge in historical reminiscence.

We are now to consider the general nature and scope of state and territorial legislation supplemental to the congressional mining laws, a minor subsidiary element in the system, but in its particular sphere important.

**§ 249. Limits within which state may legislate. —** When it is recognized that the government simply occupies the status of a landed proprietor, holding the paramount title to its public domain, with the sole right of disposal upon such terms and conditions and subject to such limitations as it may from time to time prescribe,<sup>3</sup> and that

<sup>1</sup> See, *ante*, § 81.

<sup>3</sup> See, *ante*, § 81.

<sup>2</sup> See, *ante*, title II., chs. i-vi., §§ 28-81.

the congressional mining laws are but a statement of such terms, conditions, and limitations, it follows necessarily that neither individuals nor states have the power to control, modify, or nullify any of such terms, conditions, or limitations.

If, by compliance with congressional law, an estate in public lands is granted, the state may not destroy or impair it.<sup>1</sup> If no such estate in such lands is created by or under the authority of federal law, the state has no power to create or transfer it. After an estate is once granted, and a right of property becomes vested, it is subject to the general laws of the state the same as any other property; but we now speak only of the terms, conditions, and limitations under which estates, either equitable or legal, are carved out of the public lands by the act of the paramount proprietor.

If the state may prescribe any additional or supplemental rules, increasing the burdens or diminishing the benefits granted by the federal laws in lands of the public domain, it is simply because the government, as owner of the property, sanctions, expressly or by implication, the exercise of such powers.

At one period of the national history, the states assumed the right to confer possessory rights in the public lands upon its citizens. The national government acquiesced in the assumed power for a number of years. It might have repudiated this intervention by the state, and dispossessed the occupants; but having failed to do so, certain possessory privileges were acquired, to the extent and under such circumstances that the government became, morally and in good conscience, bound to recognize them.<sup>2</sup>

This it did gracefully. But this was before the government, by legislative enactment, adopted any general laws expressly providing for the sale or disposal of its mineral lands in the precious-metal-bearing states. The legislative

<sup>1</sup> Except in the exercise of the right of eminent domain, which involves the payment of compensation. See, *post*, § 253 *et seq.*

<sup>2</sup> See, *ante*, § 59.

era succeeded the period of passive recognition, and with the passage of laws providing for the method of vesting legal or equitable estates in the public lands, the right of the states to legislate in this direction was no longer recognized, except to the extent that such power was conceded by the congressional laws.

State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of congress, as they are more in the nature of regulations under these laws than independent legislation.<sup>1</sup>

State and territorial legislation, therefore, must be entirely consistent with the federal laws. The right to supplement federal legislation conceded to the state may not be arbitrarily exercised; nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws. On the other hand, the state may not by its legislation dispense with the performance of the conditions imposed by the national law, nor relieve the locator from the obligation of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits, the state may legislate. Beyond them the state should not be permitted to go.

**§ 250. Scope of existing state and territorial legislation — Subjects concerning which states and territories may unquestionably legislate.**— Many of the states and territories have enacted codes, more or less comprehensive, supplementing congressional laws, while others have but few provisions. In the appendix will be found the legislation of each state and territory now in force.

That a correct understanding of the general scope of the existing state and territorial legislation may be gleaned, we enumerate the subjects covered by such laws, indicating which states and territories have legislated upon such subjects, first considering those concerning which such legislation is unquestionably proper, within reasonable limits.

<sup>1</sup> *Eberle v. Carmichael* (New. Mex.), 42 Pac.95.

(1) *Length of lode claims.*—Colorado,<sup>1</sup>Oregon,<sup>4</sup>North Dakota,<sup>2</sup>Washington,<sup>3</sup>South Dakota,<sup>5</sup>

While it is evident that under the congressional act the states and territories may limit the number of linear feet on a lode, or vein, which may be embraced within a single location to less than fifteen hundred feet, no state or territory has attempted any such restriction. Those states which have legislated at all upon the subject, simply repeat the general language of section twenty-three hundred and twenty of the Revised Statutes. Of course, this does not add any force to the federal enactment; nor does it detract from it. It is altogether harmless. Throughout the mining regions the unit of a lode location as to length is fifteen hundred feet.

(2) *Width of lode claims.*—Colorado,<sup>6</sup>North Dakota,<sup>6</sup>Idaho,<sup>7</sup>South Dakota,<sup>8</sup>

<sup>1</sup> Same as federal law; limit, fifteen hundred feet. Mills' Annot. Stats., § 3148.

<sup>2</sup> Same as federal law; limit, fifteen hundred feet. Rev. Pol. Code 1895, § 1426.

<sup>3</sup> Same as federal law. Pol. Code Dak. 1887, § 1907. Adopted by act of legislature—Laws 1890, ch. cv., § 1, p. 254.

<sup>4</sup> Same as federal law. Hill's Annot. Stats. (Ore.) 1892, § 3827.

<sup>5</sup> Same as federal law. Hill's Annot. Stats. (Wash.), § 221.

<sup>6</sup> In Gilpin, Clear Creek, Boulder, and Summit counties, seventy-five feet on each side of the center of the vein, in all other counties, one hundred and fifty feet on each side of the center of the vein or crevice, unless enlarged by vote of electors of a county at a general election. Mills' Annot. Stats., § 3149.

<sup>7</sup> May extend to three hundred feet on each side of the center of the vein. Rev. Stats., § 3100, as amended, Laws 1895, p. 25, § 1.

<sup>8</sup> One hundred and fifty feet on each side of the center of vein, unless enlarged to not more than three hundred feet by majority of votes in a county, cast at a general election. Rev. Pol. Code 1895, § 1427.

<sup>9</sup> Same as North Dakota. Pol. Code Dak. 1887, § 1908. Adopted by South Dakota—Laws 1890, ch. cv., § 1, p. 254.

Oregon,<sup>1</sup>  
Utah,<sup>2</sup>

Washington,<sup>3</sup>  
Wyoming.<sup>4</sup>

There can be no doubt about the power of state legislatures to limit the width of lode claims to any reasonable number of feet on each side of the center of the vein less than three hundred, and in the absence of any action in that behalf by the state, the local district organizations may regulate the subject.<sup>5</sup>

As to the provision of the statutes in Colorado and North and South Dakotas authorizing the counties to determine upon a greater width than that fixed by the state law, by a majority of the legal votes cast at a general election, Mr. Morrison, in his "Mining Rights,"<sup>6</sup> says that he knows of no instance where any such attempt has been made by any of the counties to avail themselves of the privilege. He also doubts the constitutionality of the law. If such action should be taken, and the result accepted and acted upon, it might have the force of a local regulation which does not acquire validity by mere adoption, but from customary obedience and acquiescence of the miners.<sup>7</sup>

(3) *Posting notices of location.*—

Arizona,<sup>8</sup>  
Colorado,<sup>9</sup>

Idaho,<sup>10</sup>  
Montana,<sup>11</sup>

<sup>1</sup> Same as federal statute. Hill's Annot. Stats. (Ore.) 1892, § 3827.

<sup>2</sup> Same as federal statute. Comp. Laws 1888, vol. ii., p. 138, § 2790. Adopted by Utah, as a state, on its admission.

<sup>3</sup> Not more than three hundred feet on each side of the middle of the vein. Local rules may not restrict to less than fifty feet. Hill's Annot. Stats. (Wash.) § 2211.

<sup>4</sup> Not to exceed three hundred feet. Local rules may not limit to less than one hundred and fifty feet. Laws 1888, p. 87, § 14.

<sup>5</sup> North Noonday M. Co. v. Orient M. Co., 6 Saw. 305; Jupiter M. Co. v. Bodie M. Co., 7 Saw. 104.

<sup>6</sup> Morr. Min. Rights, 8th ed. 20.

<sup>7</sup> North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie M. Co., 7 Saw. 96, 106; Harvey v. Ryan, 42 Cal. 626. See, *post*, § 271.

<sup>8</sup> Laws 1895, p. 53, § 3.

<sup>9</sup> Placers: Mills' Annot. Stats., § 3136. Lodes: *Id.* § 3152.

<sup>10</sup> Lodes: Rev. Stats., § 3101, as amended — Laws 1895, p. 26, § 2.

<sup>11</sup> Pol. Code 1895, § 3610.



New Mexico,<sup>1</sup>  
 North Dakota,<sup>2</sup>  
 South Dakota,<sup>3</sup>

Oregon,<sup>4</sup>  
 Wyoming.<sup>5</sup>

(4) *Contents of notices and certificates of location.*—

Arizona,<sup>6</sup>  
 Colorado,<sup>7</sup>  
 Idaho,<sup>8</sup>  
 Montana,<sup>9</sup>

New Mexico,<sup>10</sup>  
 North Dakota,<sup>11</sup>  
 South Dakota,<sup>12</sup>  
 Wyoming.<sup>13</sup>

Where state or territorial laws require a location notice, certificate, or declaratory statement to be recorded, the act of congress provides what such record must contain.<sup>14</sup> While states and territories may enlarge these requirements, they may not dispense with any of them.

(5) *Recording notices and certificates of location.*—

Arizona,<sup>15</sup>  
 Colorado,<sup>16</sup>  
 Idaho,<sup>17</sup>

Montana,<sup>18</sup>  
 Nevada,<sup>19</sup>  
 New Mexico,<sup>20</sup>

<sup>1</sup> Comp. Laws 1884, § 1566.

<sup>2</sup> Rev. Pol. Code 1895, § 1430.

<sup>3</sup> Pol. Code Dak. 1887, § 2001. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

<sup>4</sup> Hill's Annot. Stats. (Ore.), § 3828.

<sup>5</sup> Lodes: Laws 1888, p. 88, § 17. Placers: Laws 1888, p. 89, § 22.

<sup>6</sup> Laws 1895, p. 53, §§ 1, 2.

<sup>7</sup> Placers: Mills' Annot. Stats., § 3136. Lodes: *Id.* § 3151.

<sup>8</sup> Rev. Stats., § 3101, as amended — Laws 1895, p. 26, § 2; Rev. Stats., § 3102.

<sup>9</sup> Pol. Code 1895, § 3610.

<sup>10</sup> Comp. Laws 1884, § 1566.

<sup>11</sup> Rev. Pol. Code 1895, § 1428.

<sup>12</sup> Pol. Code Dak., § 1999. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

<sup>13</sup> Laws 1890-91, p. 179, § 1. Placers: Laws 1888, pp. 89-90, § 22.

<sup>14</sup> Rev. Stats., § 2324.

<sup>15</sup> Rev. Stats., 1887, p. 412, § 2349; Laws 1895, p. 53, § 3.

<sup>16</sup> Placers: Mills' Annot. Stats., § 3136. Lodes: *Id.*, § 3150. Tunnel Claims: *Id.*, § 3140.

<sup>17</sup> Lodes: Laws 1895, p. 27, § 4; p. 30, § 14.

<sup>18</sup> Pol. Code 1895, §§ 3612, 3613.

<sup>19</sup> Stats. Nev. 1885, p. 92, § 300.

<sup>20</sup> Comp. Laws 1884, § 1566.

North Dakota,<sup>1</sup>  
 South Dakota,<sup>2</sup>  
 Oregon,<sup>3</sup>

Utah,<sup>4</sup>  
 Washington,<sup>5</sup>  
 Wyoming.<sup>6</sup>

(6) *Authorizing amended locations and amended location certificates.—*

Arizona,<sup>7</sup>  
 Colorado,<sup>8</sup>  
 Idaho,<sup>9</sup>  
 New Mexico,<sup>10</sup>

North Dakota,<sup>11</sup>  
 South Dakota,<sup>12</sup>  
 Wyoming.<sup>13</sup>

(7) *Marking of boundaries and defining the character of posts and monuments.—*

Arizona,<sup>14</sup>  
 Colorado,<sup>15</sup>  
 Idaho,<sup>16</sup>  
 Montana,<sup>17</sup>

New Mexico,<sup>18</sup>  
 North Dakota,<sup>19</sup>  
 South Dakota,<sup>20</sup>  
 Wyoming.<sup>21</sup>

<sup>1</sup> Rev. Pol. Code 1895, § 1428.

<sup>2</sup> Pol. Code Dak. 1887, § 1999. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

<sup>3</sup> Hill's Annot. Laws (Ore.), § 3831.

<sup>4</sup> Comp. Laws 1888, vol. ii., p. 139, §§ 2794, 2795. Adopted by Utah on its admission as a state.

<sup>5</sup> Hill's Annot. Stats. (Wash.), §§ 2214, 2215, 2216.

<sup>6</sup> Laws 1890-91, 179.1

<sup>7</sup> Laws 1895, p. 54, § 7.

<sup>8</sup> Mills' Annot. Stats., § 3160.

<sup>9</sup> Laws 1895, p. 27, § 5.

<sup>10</sup> Laws 1889, p. 43, § 4.

<sup>11</sup> Rev. Pol. Code 1895, § 1437.

<sup>12</sup> Comp. Laws Dak. 1887, § 2008. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

<sup>13</sup> Laws 1888, p. 85, § 7.

<sup>14</sup> Laws 1895, p. 53, § 4.

<sup>15</sup> Placers: Mills' Annot. Stats., § 3136. Lodes: *Id.*, § 3153.

<sup>16</sup> Lodes: Rev. Stats., § 3101, as amended — Laws 1895, p. 25, *et seq.*

<sup>17</sup> Pol. Code 1895, § 3611.

<sup>18</sup> Laws 1889, p. 42, § 2.

<sup>19</sup> Rev. Pol. Code 1895, § 1431.

<sup>20</sup> Comp. Laws Dak. 1887, § 2002. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

<sup>21</sup> Laws 1888, p. 88, § 17.

(8) *Fixing time within which location shall be completed after discovery.—*

Arizona, <sup>1</sup>	New Mexico, <sup>5</sup>
Colorado, <sup>2</sup>	North Dakota, <sup>6</sup>
Idaho, <sup>3</sup>	South Dakota, <sup>7</sup>
Montana, <sup>4</sup>	Wyoming. <sup>8</sup>

(9) *Providing for the manner of relocating abandoned claims.—*

Arizona, <sup>9</sup>	New Mexico, <sup>13</sup>
Colorado, <sup>10</sup>	North Dakota, <sup>14</sup>
Idaho, <sup>11</sup>	South Dakota, <sup>15</sup>
Montana, <sup>12</sup>	Wyoming. <sup>16</sup>

(10) *Amount of annual work.—*

Arizona, <sup>17</sup>	New Mexico, <sup>19</sup>
Colorado, <sup>18</sup>	North Dakota, <sup>20</sup>

<sup>1</sup> Laws 1895, p. 54, § 6.

<sup>2</sup> Placers: Mills' Annot. Stats. § 3136. Lodes: *Id.*, § 3155.

<sup>3</sup> Lodes: Laws 1895, p. 26, *et seq.*, §§ 2, 3, 4.

<sup>4</sup> Pol. Code 1895, § 3612.

<sup>5</sup> Comp. Laws 1884, § 1566.

<sup>6</sup> Rev. Pol. Code 1895, § 1428.

<sup>7</sup> Comp. Laws Dak. 1887, §§ 1999, 2004. Adopted in South Dakota — Laws 1890, ch. cv., § 1.

<sup>8</sup> Lodes: Laws 1890-91, p. 179, §§ 1, 2. Placers: Laws 1888, pp. 89, 90, § 22.

<sup>9</sup> Laws 1895, p. 55, § 11.

<sup>10</sup> Mills' Annot. Stats., § 3162.

<sup>11</sup> Laws 1895, p. 28, § 7.

<sup>12</sup> Pol. Code 1895, § 3615.

<sup>13</sup> Laws 1889, p. 42, § 3.

<sup>14</sup> Rev. Pol. Code, § 1439.

<sup>15</sup> Comp. Laws Dak. 1887, § 2010. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

<sup>16</sup> Laws 1888, p. 89, § 21.

<sup>17</sup> Re-enacts the federal law. Laws 1895, p. 54, § 8.

<sup>18</sup> Placers: Mills' Annot. Stats., § 3137, declared in conflict with federal law. *Sweet v. Webber*, 7 Colo. 443, 450.

<sup>19</sup> Fixing value of day's labor at four dollars for eight hours. Comp. Laws 1884, § 1568.

<sup>20</sup> Same as the federal law. Rev. Pol. Code, § 1438.

South Dakota,<sup>1</sup>  
Oregon,<sup>2</sup>

Washington,<sup>3</sup>  
Wyoming.<sup>4</sup>

No state has a right to decrease the amount of labor which the congressional law requires to be done annually on a mining claim. The law clearly implies that the states and territories, or the district organizations, in the absence of state or territorial legislation, may increase the amount of such labor.<sup>5</sup> The statutory declaration, as in New Mexico, that a day's work of eight hours is of the value of four dollars, and must be so computed in estimating the amount of annual labor performed on a mining claim, is of questionable propriety. Mr. Morrison is of the opinion that such provisions "amount to absolutely nothing."<sup>6</sup>

(11) *Authorizing the recording of affidavits of performance of annal labor.—*

Arizona,<sup>7</sup>  
California,<sup>8</sup>  
Colorado,<sup>9</sup>  
Idaho,<sup>10</sup>

Montana,<sup>11</sup>  
New Mexico,<sup>12</sup>  
Wyoming.<sup>13</sup>

(12) *Prescribing manner of organizing mining districts.—*

Wyoming.<sup>14</sup>

<sup>1</sup> Same as the federal law. Comp. Laws Dak., § 2009. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

<sup>2</sup> Provides for work to amount of fifty dollars per claim, to be performed within one year from date of location. Hill's Annot. Stats. (Ore.) 1892, § 3830.

<sup>3</sup> One hundred dollars each year; but year dates from date of location. Hill's Annot. Stats. (Wash.), § 2213.

<sup>4</sup> Placers: One hundred dollars per annum on claims consisting of one hundred and sixty acres; on claims of less than one hundred and sixty acres, sixty-two and a half cents per acre. Laws 1888, pp. 90, 91, § 23.

<sup>5</sup> Rev. Stats., § 2324.

<sup>6</sup> Morr. Min. Rights, 8th ed. 67.

<sup>7</sup> Laws 1895, p. 54, § 9.

<sup>8</sup> Laws 1891, ch. clv., p. 219.

<sup>9</sup> Mills' Annot. Stats., § 3161; Laws 1889, 261.

<sup>10</sup> Laws 1895, p. 27, § 6.

<sup>11</sup> Pol. Code, 1895, § 3614.

<sup>12</sup> Prince's Supplement, 673.

<sup>13</sup> Placers: Laws 1888, p. 90, § 23.

<sup>14</sup> Laws 1888, p. 84, § 1.

- (13) *Authorizing survey of claim to be made by deputy mineral surveyor, and when recorded to become a part of the location certificate and become prima facie evidence as to all facts therein contained.—*

Montana.<sup>1</sup>

- (14) *Manner of locating tunnel claims and length allowed on discovered lodes.—*

Colorado,<sup>2</sup>

Montana.<sup>3</sup>

- (15) *Requiring sinking of discovery shaft or its equivalent prior to completion of location.—*

Arizona,<sup>4</sup>

New Mexico,<sup>5</sup>

Colorado,<sup>5</sup>

North Dakota,<sup>9</sup>

Idaho,<sup>6</sup>

South Dakota,<sup>10</sup>

Montana,<sup>7</sup>

Wyoming.<sup>11</sup>

Secretary Teller expressed a doubt whether a state legislature has the right to attach this condition to the appropriation of mineral land,<sup>12</sup> although Commissioner Williamson held that such requirement is not in conflict with the congressional laws.<sup>13</sup> The state courts have uniformly enforced this class of provisions; and there being no authoritative ruling denying the right to the state to so legislate, these conditions may be assumed to be valid.

<sup>1</sup> Pol. Code 1895, § 3616.

<sup>2</sup> Mills' Annot. Stats. §§ 3140-3141.

<sup>3</sup> Comp. Stats. Mont. 1887, §§ 1487-1491.

<sup>4</sup> Laws 1895, p. 53, §§ 3, 5.

<sup>5</sup> Mills' Annot. Stats., §§ 3152, 3154, 3155.

<sup>6</sup> Laws 1895, p. 27, § 3.

<sup>7</sup> Pol. Code 1895, § 3611.

<sup>8</sup> Laws 1889, p. 42, § 1; Comp. Laws 1884, § 1571.

<sup>9</sup> Rev. Pol. Code 1895, §§ 1430, 1432, 1433.

<sup>10</sup> Comp. Laws Dak. 1887, §§ 2001, 2003. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

<sup>11</sup> Laws 1888, p. 88, §§ 17, 18; Laws 1890-91, p. 180.

<sup>12</sup> Wight v. Tabor, 2 L. D. 738, 742; S. C. on review, *Id.* 743.

<sup>13</sup> *In re Alfred H. Hale*, 7 Copp's L. O. 115.

While it is manifest that the states and territories may legislate within a reasonable limit upon the foregoing subjects, we do not intend that it should be inferred that all of the legislation hereinbefore noted is absolutely in harmony with the letter and spirit of the national law. It is not our purpose at the present time to deal with individual state and territorial legislation analytically. When we deal with the requirements of a valid location, the conditions required to perfect and perpetuate it, we shall note, under each appropriate head, the nature and force of such legislation. We are now presenting generally the subjects upon which, to some extent, states and territories are permitted to legislate.

**§ 251. Subjects upon which states have enacted laws the validity of which is open to question.**—It is extremely difficult to draw the line between what is proper supplemental state legislation and what is not. But there are some subjects upon which there has been state and territorial legislation, which legislation is either clearly obnoxious to the federal law or open to criticism as being ineffectual, by reason of its being a mere reiteration of the provisions of the Revised Statutes. We note the following instances which illustrate this:—

- (1) *Laws giving a locator the right to all lodes which have their top or apex within the location, and defining the extralateral right.*—

North Dakota,<sup>1</sup>

Washington,<sup>3</sup>

South Dakota,<sup>2</sup>

Wyoming.<sup>4</sup>

- (2) *Rights of parties in cases of lodes crossing or uniting.*—  
Colorado.<sup>5</sup>

<sup>1</sup> Rev. Pol. Code 1895, § 1434.

<sup>2</sup> Comp. Laws Dak. 1887, § 2005. Adopted by South Dakota—Laws 1890, ch. cv., § 1.

<sup>3</sup> Hill's Annot. Stats. (Wash.), § 2212.

<sup>4</sup> Laws 1888, p. 89, § 20.

<sup>5</sup> Mills' Annot. Stats., § 3142.

- (3) *Prohibiting the proprietor of a mining claim from pursuing his vein on its strike beyond vertical planes drawn through surface boundaries.*—

Colorado,<sup>1</sup>

South Dakota.<sup>2</sup>

North Dakota,<sup>3</sup>

These three classes of legislation clearly trench upon the power of congress. These subjects can only be regulated by the federal law, as they attempt to define and limit the character of the estate granted by the government. We do not understand that any of these provisions conflict with the federal law. But their re-enactment by the states gives them no force. If in harmony with the federal law, they are unnecessary; if obnoxious to it, they are void.

- (4) *Verification of location certificates by oath.*—

Idaho,<sup>4</sup>

Montana.<sup>5</sup>

In *Wenner v. McNulty*, the supreme court of Montana expressed its doubt of the right of the then territory to impose the additional burden upon the locator of verifying the notice of location by oath, and stated that this rule trenched very closely upon the federal law.<sup>6</sup> But in *O'Donnell v. Glenn*,<sup>7</sup> the court squarely upheld the law. In a still later case, Judge De Witt, speaking for the court, conceived that there were doubts about the validity of the rule, but declined to overrule *O'Donnell v. Glenn* and sustained the doctrine of that case. This ruling was followed in cases since decided by that court.<sup>8</sup> It was raised in the federal courts, but was not passed upon.<sup>9</sup>

<sup>1</sup> Mills' Annot. Stats., § 3157.

<sup>2</sup> Rev. Pol. Code 1895, § 1435.

<sup>3</sup> Comp. Laws Dak. 1887, § 2006. Adopted by South Dakota—Laws 1890, ch. cv., § 1.

<sup>4</sup> Rev. Stats., § 3104, as amended—Laws 1895, p. 29, § 13.

<sup>5</sup> Declaratory statement on oath. Pol. Code 1895, § 3612.

<sup>6</sup> Mont. 30, 57.

<sup>7</sup> 8 Mont. 248, 252.

<sup>8</sup> *McCowan v. Maclay*, 10 Mont. 23; *Berg v. Koegel*, 40 Pac. 605.

<sup>9</sup> *Preston v. Hunter*, 67 Fed. 996.



(5) *Providing methods for forfeiting estate of delinquent co-owner.*—

Arizona,<sup>1</sup>

Colorado,<sup>3</sup>

California,<sup>2</sup>

Nevada.<sup>4</sup>

The act of congress on this subject<sup>5</sup> is open to the criticism that it attempts to deprive a person of property without due process of law. Ordinarily, forfeitures may only be adjudged by courts of competent jurisdiction, after a full investigation as to the facts. In any event, as was said by Judge De Witt, speaking for the supreme court of Montana, the statute must be strictly construed.<sup>6</sup>

If the act of congress is insufficient to divest the title of the co-owner, we do not see how the state may supplement it by laws which do not contemplate the institution of judicial proceedings. If the federal law is sufficient, there is no necessity for state legislation. We do not think that this subject is within the legitimate scope of state or territorial legislation. A state might create a lien in favor of the co-owner who pays more than his proportion of the annual expenditures, and authorize proceedings to foreclose that lien; but to sanction a forfeiture through the method of *ex parte* proceedings is repugnant to the spirit of the law. It *may* be accomplished under the federal law. But we deny the right of the state to legislate, except within the lines herein suggested.

(6) *Specifying the character of deposits which may be located under the placer laws.*—

Montana.<sup>7</sup>

While all the substances named in the Montana act fall within the definition of the term “mineral,” as we under-

<sup>1</sup> Laws 1891, 140.

<sup>2</sup> Stats. 1891, ch. clv., p. 219.

<sup>3</sup> Mills' Annot. Stats., § 3137.

<sup>4</sup> Stats. 1887, p. 136, §§ 1-3.

<sup>5</sup> Rev. Stats., § 2324.

<sup>6</sup> Brundy v. Mayfield, 15 Mont. 201.

<sup>7</sup> Building-stone, limestone, marble, clay, and other mineral substances having a commercial value. Pol. Code 1895, § 3610.

stand it,<sup>1</sup> making legislation of this character unnecessary, yet the state has no right by its legislature to construe federal laws. A provision like the foregoing would be eminently proper in a congressional law, and if enlarged and adopted by congress, it would have the effect of removing the ambiguities and uncertainties now existing. But we cannot understand how it is within the power of a state to dictate to the national government what substances it shall dispose of under its mineral laws.

**§ 252. Drainage, easements, and rights of way for mining purposes**—By section twenty-three hundred and thirty-eight of the Revised Statutes, it is enacted that—

“As a condition of sale, in the absence of necessary legislation by congress, the local legislation of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development, and those conditions shall be fully expressed in the patent.”

Arizona<sup>2</sup> and Colorado<sup>3</sup> have enacted laws providing for and regulating drainage of mines; and in the following territories and states we find local legislation prescribing methods of obtaining easements and rights of way for mining purposes and providing for condemnation proceedings:—

Arizona,<sup>4</sup>  
California,<sup>5</sup>  
Colorado,<sup>6</sup>  
Idaho,<sup>7</sup>  
Montana,<sup>8</sup>

Nevada,<sup>9</sup>  
New Mexico,<sup>10</sup>  
North Dakota,<sup>11</sup>  
South Dakota,<sup>12</sup>  
Wyoming.<sup>13</sup>

<sup>1</sup> See, *ante*, § 68.

<sup>2</sup> Rev. Stats. 1887, §§ 2352-2557.

<sup>3</sup> Mills' Annot. Stats., §§ 3172-3180.

<sup>4</sup> Laws 1881, 197.

<sup>5</sup> Code Civ. Proc., as amended 1895, § 1238.

<sup>6</sup> Mills' Annot. Stats., § 3138.

<sup>7</sup> Acts 1877, 1881.

<sup>8</sup> Pol. Code 1890, §§ 3630-3640; Code Civ. Proc., § 2211.

<sup>9</sup> Comp. Laws, § 120; Stats. 1887, pp. 102, 103, § 1.

<sup>10</sup> Laws 1889, 347.

<sup>11</sup> Comp. Laws Dak. 1887, §§ 2010-2028.

<sup>12</sup> Same as North Dakota.

<sup>13</sup> Laws 1888, p. 84, § 5.

This class of legislation, in the states at least, is not, strictly speaking, supplemental to the federal law. It is more in the nature of independent legislation, the validity and operative force of which is to be determined from a consideration of the limitation upon legislative action prescribed by the organic laws of the respective states.

In the case of the People *ex rel.* Aspen M. & S. Co. v. District Court, considered by the supreme court of Colorado,<sup>1</sup> it was urged that section twenty-three hundred and thirty-eight of the Revised Statutes imposed upon mineral lands acquired under the mining laws conditions which could not be ignored by the states; that they amounted practically to a burden charged upon the land and a limitation of the estate conveyed. Therefore, that these provisions were above and beyond state legislation upon the subject of eminent domain; that the state could not by its constitution abridge or curtail the privileges sanctioned by the law of congress; and that the doctrine of public "utility" in no way controlled this class of easements.

The contention, however, was not sustained. The supreme court of Colorado was of the opinion that, so far as the territories were concerned, congress might authorize the organization of a local government, with authority to enact laws, or it might legislate directly for the government of the territory. But upon the admission of a territory into the union as a sovereign state, the right of local self-government passes to the state.<sup>2</sup> The power of legislation thereafter resides in the people of the state, and is absolute and uncontrolled save as to the enumerated powers reserved to the national government by the federal constitution and the restraints upon state legislation imposed by that instrument. Other limitations upon the powers of the legislative department of a state are to be found in the state constitution. One of the powers of state sovereignty which may be exercised in the regulation and control of private property is termed the right of eminent domain. The

<sup>1</sup> 11 Colo. 147.

<sup>2</sup> See, also, *Woodruff v. North Bloomfield G. M. Co.*, 18 Fed. 774-775.

exercise of this power within the states by the federal government extends only to appropriations by the United States for sites for post-offices, court-houses, forts, arsenals, light-houses, custom-houses, and other public uses.

"The foregoing principles, [said the supreme court of Colorado], declaratory of the sovereign powers pertaining to the federal and state governments respectively, do not sustain the broad proposition of counsel that congress may ignore state constitutions and authorize local legislatures, regardless of state constitutions, to pass laws providing rules for the working of mines and involving easements upon mineral lands. It is the solemn duty of the courts of a state to enforce the state constitution as the paramount law, whenever an act of the state legislature is found to be clearly in conflict therewith. Assuming that the state constitution is a valid instrument, the authority of congress to authorize the state legislature to pass laws upon any subject in conflict therewith cannot be admitted. But congress has not assumed to exercise such a power. The rules and easements intended to be authorized by the fifth section of the congressional act of July 26, 1866, [now embodied in § 2338, Rev. Stats.] were evidently such as should be enacted in accordance with the fundamental law of the state or territory. Considered with reference to the territories, the section is unobjectionable in any view of the question, since, as we have seen, the power of congress to govern them is absolute. . . . As applicable to state governments, the provision may be regarded as authorizing them to supplement the act of congress with necessary and proper rules and requirements, to be observed by citizens who have availed or might avail themselves of the privilege given to explore, occupy, and mine the mineral lands of the public domain with a view to acquiring title thereto. In so far as the provisions of the act may be regarded as conferring power upon the state legislature, to regulate the manner of using and operating mining claims, with a view to the protection of the rights of the several claimants, and to render available their respective locations, by imposing restraints on the mode of operating and using them, including necessary easements over the same, it would seem from the authorities cited that the states already possessed this power. Being comparatively a

(Now embodied in § 2338, Rev. Stats.)

“ new question, however, at the date of the passage of the  
“ congressional act, this and the other permissive clauses  
“ were properly and wisely inserted. The opinion of Mr.  
“ Justice Field, in *Jennison v. Kirk* (98 U. S. 453-460), upon  
“ other portions of this act, shows that the intention of  
“ congress by the insertion of provisions of this character  
“ was not to grant easements upon mining claims, but to  
“ sanction such as might be regularly granted by the local  
“ authorities, and in order that they might be perpetuated as  
“ property rights after the title had passed from the govern-  
“ ment. This precaution prevents any controversy in the  
“ future as to the power of either territory or state to im-  
“ pose easements on these lands while they belong to the  
“ United States.

“ From these principles and considerations, we arrive  
“ at the conclusion, that, unless a state statute imposing an  
“ easement upon mining claims is in accord with the state  
“ constitution, it can not be enforced by our courts.”

The case under consideration arose out of an attempt to condemn a right of way for a tramway across the lands of another, to enable the Aspen Mining and Smelting Company to transport ores from its mines to the sampling works in the town of Aspen, under a statute which provided that all mining claims now located, or which may be hereafter located, shall be subject to the right of way for any tramway, whether now in use or which may hereafter be laid across any such location, to be condemned as in case of land taken for public highways when the consent of the owner cannot be obtained.<sup>1</sup>

The constitution of the state limited the power of the legislative department to the taking of private property for public use, and for the following *private* uses: “ For  
“ private ways of necessity and for reservoirs, drains,  
“ flumes, or ditches for agricultural, mining, milling, do-  
“ mestic, or sanitary purposes.”<sup>2</sup>

The court held that, as tramways were not within the sanction of the constitution, the act of the legislature in question was void.

<sup>1</sup> Gen. Stats. Colo., 1887, § 2407.

<sup>2</sup> Const., art. ii., §§ 14, 15.

From a consideration of this case, the doctrine of which is in harmony with the views announced by Judge Cooley, the most eminent of all writers on constitutional law,<sup>1</sup> it cannot be doubted that the validity of the laws of the several states purporting to provide for securing easements and rights of way over the lands of others, for purposes connected with the industry of mining, must be determined regardless of the federal laws, and in the light of the respective state constitutions. The exercise by the state of its sovereign right of eminent domain cannot be interfered with by the United States.<sup>2</sup>

**§ 253. Provisions of state constitutions on the subject of eminent domain.**—As preliminary to a discussion of the general features of state legislation on this subject, we think it not inappropriate to present an epitome of the constitutional provisions of the several states where laws of this class have been enacted, so far as such provisions are germane.

**California.**—

“Private property shall not be taken or damaged for public  
“use without just compensation having been first made to, or  
“paid into court for, the owner, and no right of way shall be  
“appropriated to the use of any corporation other than muni-  
“cipal until full compensation therefor be first made in money  
“or ascertained or paid into court for the owner, irrespective  
“of any benefit for any improvement proposed by such cor-  
“poration, which compensation shall be ascertained by a jury,  
“unless a jury be waived, as in other civil cases in a court of  
“record, as shall be prescribed by law.”<sup>3</sup>

“The exercise of the right of eminent domain shall never  
“be so abridged or construed as to prevent the legislature  
“from taking the property and franchises of incorporated com-  
“panies and subjecting them to public use, the same as the  
“property of individuals.”<sup>4</sup>

<sup>1</sup> Cooley's Const. Limit., 6th ed., 645.

<sup>2</sup> Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403.

<sup>3</sup> Const. Cal., art. i., § 14.

<sup>4</sup> *Id.*, art xii., § 8.

“The use of all water now appropriated, or that may here-  
“after be appropriated, for sale, rental, or distribution, is  
“hereby declared to be a public use, and subject to the regula-  
“tion and control of the state, in the manner to be prescribed  
“by law.”<sup>1</sup>

**Colorado.—**

“That private property shall not be taken for private use  
“unless by consent of the owner, except for private ways of  
“necessity, and except for reservoirs, drains, flumes, or ditches  
“on or across the land of others, for agricultural, mining,  
“milling, domestic, or sanitary purposes.”<sup>2</sup>

“That private property shall not be taken or damaged, for  
“public or private use, without just compensation. Such  
“compensation shall be ascertained by a board of commission-  
“ers, of not less than three freeholders, or by a jury when  
“required by the owner of the property, in such manner as  
“may be prescribed by law, and until the same shall be paid  
“to the owner, or into court for the owner, the property shall  
“not be needlessly disturbed, or the proprietary rights of the  
“owner therein divested; and whenever an attempt is made  
“to take private property for a use alleged to be public, the  
“question whether the contemplated use be really public,  
“shall be a judicial question, and determined as such without  
“regard to any legislative assertion that the use is public.”<sup>3</sup>

**Idaho.—**

“The necessary use of lands for the construction of reservoirs  
“or storage basins, for the purpose of irrigation, or for rights  
“of way for the construction of canals, ditches, flumes, or pipes,  
“to convey water to the place of use, for any useful, beneficial,  
“or necessary purpose, or for drainage; or for the drainage of  
“mines or the working thereof, by means of roads, railroads,  
“tramways, cuts, tunnels, shafts, hoisting works, dumps, or  
“other necessary means to their complete development, or any  
“other use necessary to the complete development of the ma-  
“terial resources of the state, or the preservation of the health  
“of its inhabitants, is hereby declared to be a public use, and  
“subject to the regulation and control of the state.

<sup>1</sup> Const. Cal., art. xiv., § 1.   <sup>2</sup> Const. Colo., art. ii., § 14.   <sup>3</sup> *Id.*, art. ii., § 15.



"Private property may be taken for public use, but not  
 "until a just compensation, to be ascertained in a manner  
 "prescribed by law, shall be paid therefor."<sup>1</sup>

**Montana.—**

"Private property shall not be taken or damaged for public  
 "use without just compensation having been first made to, or  
 "paid into the court for, the owner."<sup>2</sup>

"The use of all water now appropriated, or that may here-  
 "after be appropriated, for sale, rental, distribution, or other  
 "beneficial use, and the right of way over the lands of others,  
 "for all ditches, drains, flumes, canals, and aqueducts neces-  
 "sarily used in connection therewith, as well as the sites for  
 "reservoirs necessary for collecting and storing the same,  
 "shall be held to be a public use. Private roads may be  
 "opened in the manner to be prescribed by law; but in every  
 "case the necessity of the road, and the amount of all damage  
 "to be sustained by the opening thereof, shall be first deter-  
 "mined by a jury, and such amount, together with the  
 "expenses of the proceeding, shall be paid by the person to be  
 "benefited."<sup>3</sup>

**Nevada.—**

"Nor shall private property be taken for public use  
 "without just compensation having been first taken or se-  
 "cured, except in cases of war, riot, fire, or great public peril,  
 "in which case compensation shall be afterward made."<sup>4</sup>

**North Dakota.—**

"Private property shall not be taken or damaged for public  
 "use without just compensation having been first made to,  
 "or paid into court for, the owner, and no right of way shall  
 "be appropriated to the use of any corporation other than  
 "municipal, until full compensation therefor be first made in  
 "money, or ascertained and paid into court for the owner,  
 "irrespective of any benefit from any improvement proposed  
 "by such corporation, which compensation shall be ascer-  
 "tained by a jury, unless a jury be waived."<sup>5</sup>

<sup>1</sup> Const. Idaho, art. i., § 14.

<sup>4</sup> Const. Nev., art. i., § 8.

<sup>2</sup> Const. Mont., art. iii., § 14.

<sup>5</sup> Const. N. Dak., art. i., § 14.

<sup>3</sup> *Id.*, art. iii., § 15.

**South Dakota.—**

“Private property shall not be taken for public use, or  
“damaged, without just compensation, as determined by a  
“jury, which shall be paid as soon as it can be ascertained,  
“and before possession is taken. No benefit which may  
“accrue to the owner as a result of an improvement made  
“by any private corporation shall be considered in fixing  
“the compensation for property taken or damaged. The fee  
“of land taken for railroad tracks or other highways shall  
“remain in such owners, subject to the use for which it is  
“taken.”<sup>1</sup>

**Utah.—**

“Private property shall not be taken or damaged for a  
“public use without just compensation.”<sup>2</sup>

**Wyoming.—**

“Private property shall not be taken for private use un-  
“less, by consent of the owner, except for private ways of  
“necessity, and for reservoirs, drains, flumes, or ditches on or  
“across the lands of others, for agricultural, mining, milling,  
“domestic, or sanitary purposes, nor in any case without due  
“compensation.”<sup>3</sup>

“Private property shall not be taken or damaged for public  
“or private use without just compensation.”<sup>4</sup>

It will thus be seen that private property may be subjected to burdens for certain specified purposes that may be classified as private, in Colorado, Idaho, Montana, and Wyoming. In these states, it would seem that, within the limitations prescribed by the respective constitutions, the local legislatures may act, although some of the uses are not essentially public. The legislation in the remaining states,—*i. e.* California, Nevada, North Dakota, and South Dakota,—and in the other states, for purposes not within the specified limitations, must necessarily be confined to such uses as are essentially public in their nature.

<sup>1</sup> Const. S. Dak., art. vi., § 13.

<sup>2</sup> Const. Utah, art. i., § 22.

<sup>3</sup> Const. Wyo., art. i., § 32.

<sup>4</sup> *Id.*, art. i., § 33.

§ 254. **Mining as a "public use."**—An exhaustive discussion of the law of eminent domain is hardly within the scope of this treatise, but it is necessary to deal with it to some extent.

We assume that the organic law of a state may properly provide for the condemnation of private property for private use. Such constitutional provisions, wherever they exist, form exceptions to the general rules of law upon the subject of eminent domain. Our future presentation of the law is alone applicable to states where such class of provisions do not exist, and to such uses which do not fall within the above exceptions or limitations.

Mr. Lewis, in his work on the "Law of Eminent Domain," states that, apart from constitutional considerations, it is not essential in order to constitute an act of eminent domain that the use for which property is taken should be of a public nature. It is sufficient that the use of the particular property is necessary to enable individual proprietors to cultivate and improve their land to the best advantage, or to develop certain natural and exceptional resources incident thereto, such as a water privilege or a mine. In such cases, the public welfare is promoted, though indirectly, by the increased prosperity which necessarily results from developing the natural resources of the country.<sup>1</sup>

This is an exceedingly optimistic view of the rule, not concurred in by other writers. Mr. Mills thus states his conclusions upon the subject of condemnation for private use. —

"The use to which property is condemned must be public. As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require a man to part with one inch of his estate."<sup>2</sup>

Judge Cooley says: —

"It is conceded on all hands that the legislature has no power, in any case, to take the property of one individual

<sup>1</sup> Lewis on Eminent Domain, § 1.    <sup>2</sup> Mills on Eminent Domain, § 22.

“and pass it over to another, without reference to some use to which it is to be applied for public benefit.”<sup>1</sup>

Only a few of the state constitutions in terms prohibit the taking of private property for private use. All the courts, however, agree that this can not be done.<sup>2</sup>

As was said by the supreme court of New Jersey,—

“There is no prohibition in the constitution of this state, or in any of the state constitutions that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They may make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another is not making a law or rule of action; it is not legislation, it is simply robbery.”<sup>3</sup>

While this may be true, the rule announced is based upon a taking for a purely private purpose, unaccompanied by any supposed indirect public benefit.

As to what constitutes a “public use” is a difficult question. It is impossible for us to supply a definition sufficiently comprehensive to cover all possible cases. Nor is it necessary that we should do so. The question as to whether a given use is or is not public, is a judicial one. The legislature can not so determine that the use is public as to make the determination conclusive upon the courts; but the presumption is in favor of the public character of a use declared to be public by the legislature; and unless it is seen at first blush that it is not possible for the use to be public, the courts can not interfere.<sup>4</sup>

<sup>1</sup> Cooley's Const. Limit., 6th ed., 651.

<sup>2</sup> Lewis on Eminent Domain, § 157, and cases cited in note.

<sup>3</sup> Coster v. Tide Water Co., 18 N. J. Eq. 54, 63.

<sup>4</sup> Mills on Eminent Domain, § 10; Lewis on Eminent Domain, § 158.

The rule is different in Colorado, whose constitution provides that the question is to be determined without regard to any legislative assertion. Const. Colo., art. ii., § 15.

§ 255. **Rights of way for pipe-lines for the conveyance of oil and natural gas.**—In the application of these principles to the class of state legislation under consideration, we find that the decisions of the courts are not altogether uniform. The power of eminent domain has been exercised for pipe-lines for the conveyance of oil and natural gas.<sup>1</sup>

But these uses are just as much public in their nature as supplying water to municipalities. Fuel and light are just as essential commodities as water, and their general distribution to the public for domestic, manufacturing, or industrial purposes is of unquestioned "public utility."

§ 256. **Lateral and other railroads, for transportation of mine products.**—The mining interests in certain localities have been deemed sufficiently important to justify statutes enabling a mine-owner to condemn rights of way from his mine to the nearest available thoroughfare, by means of what are termed "lateral railroads." But the laws authorizing the construction and maintenance of such railroads over the lands of another provide that all persons who may have occasion to do so may utilize them, thus making the use, at least, *quasi* public.<sup>2</sup>

A railroad company organized under a law making it a common carrier of passengers and freight may, of course, condemn land for its roadbed.<sup>3</sup> And the fact that the road terminates at a mine, and is used for transporting the mined product, does not alter the public character of the use.<sup>4</sup>

But, in respect to the transportation of mine products, it has been held that a mine-owner can not condemn land for a railroad to be used exclusively for the product of his

<sup>1</sup> Randolph on Eminent Domain, § 47; West Va. Trans. Co. v. Volcanic C. Co., 5 W. Va. 382; Johnston v. Gas Co., 5 Cent. Rep. 504; Carothers' Appeal, 118 Pa. 468.

<sup>2</sup> Randolph on Eminent Domain, § 47; Hibernia R. R. Co. v. De Camp, 77 N. J. 118; New Cent. C. Co. v. George's Creek C. Co., 57 Md. 537; Phillips v. Watson, 61 Iowa, 28; Brown v. Corey, 43 Pa. St. 495.

<sup>3</sup> Contra Costa R. R. v. Moss, 23 Cal. 423.

<sup>4</sup> Colorado E. Ry. Co. v. Union Pac. Ry. Co., 41 Fed. 293.

own mine.<sup>1</sup> Such use is a mere private one, to which the law of eminent domain is inapplicable.<sup>2</sup>

This was the rule announced as to tramways by the supreme court of Colorado, heretofore discussed;<sup>3</sup> also, by the supreme court of Pennsylvania,<sup>4</sup> and the supreme court of West Virginia.<sup>5</sup>

§ 257. **Physical and industrial conditions as affecting the rule of "public utility."**—Mr. Randolph, in his work on eminent domain,<sup>6</sup> says:—

"The magnitude of the interests involved seems to have been in some cases the determining factor in upholding the necessity for condemnation."<sup>7</sup>

"This seems to account for the distinction drawn by Chief Justice Shaw between a single mill and a great mill power—the latter a public use,<sup>8</sup> and the former not."<sup>9</sup>

"Whatever merit there is in this particular distinction, there is doubtless some, albeit an indefinable force of principle. One might admit the publicity of lateral railroads and irrigation works in states containing great mineral deposits and vast tracts of arid land,<sup>10</sup> and deny the necessity of these works in states where mineral wealth and desert land are so insignificant as to render the public gain by their development absurdly disproportionate to the private benefit.

"There is some force in the suggestion that 'what shall be considered a public use may depend somewhat on the situation and wants of the community for the time being.'"<sup>11</sup>

<sup>1</sup> Randolph on Eminent Domain, § 47; Stewart's Appeal, 56 Pa. 413; McCandless's Appeal, 70 Pa. 210; Sholl v. German C. Co., 118 Ill. 427.

<sup>2</sup> People v. Pittsburg R. R., 53 Cal. 694.

<sup>3</sup> People ex rel. Aspen M. Co. v. District Court, 11 Colo. 147.

<sup>4</sup> Edgewood R. R.'s Appeal, 79 Pa. St. 257.

<sup>5</sup> Valley City S. Co. v. Brown, 7 W. Va. 191.

<sup>6</sup> Randolph on Eminent Domain, § 52.

<sup>7</sup> Great Falls Mfg. Co. v. Fernald, 47 N. H. 444.

<sup>8</sup> Hazen v. Essex Co., 12 Cush. 475.

<sup>9</sup> Murdock v. Stickney, 8 Cush. 113.

<sup>10</sup> See, Oury v. Goodwin, 26 Pac. 376. This case very ably presents the question as applied to water-ways for irrigation purposes, in many of its aspects. The opinion is replete with authorities, and presents the law logically.

<sup>11</sup> Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694.



§ 258. **The rule in Nevada.**—The state of Nevada enacted a law which provided that —

"The production and reduction of ores are of vital necessity to the people of this state, are pursuits in which all are interested, and from which all derive a benefit, so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor."<sup>1</sup>

We have already noted the provisions of the Nevada constitution on this subject.

An action was brought under this statute to condemn a strip of land to enable the Dayton Mining Company to transport over it the wood, lumber, timbers, and other materials required by it in the conduct of its business of mining. The district court declined to act upon the application on the ground that the statute in question was unconstitutional and void.

A writ of mandate was applied for, to compel the district court to act, upon which application the supreme court of the state admitted that private property could not be taken for private use; that the declaration by the legislature was not conclusive upon the courts, and that the sole question to be determined was whether the use was a public one. Upon this the court, speaking through Chief Justice Hawley, said:—

"The reasons in favor of sustaining the act under consideration are certainly as strong as any that have been given in support of the mill-dam, or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes, except for the fact of a home market having been created by the mining developments in different sections of the state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and

<sup>1</sup>Stats. 1875, 111.



“ mills. The mines are fixed by the laws of nature, and are  
“ often found in places almost inaccessible. For the purpose  
“ of successfully conducting and carrying on the business  
“ of ‘ mining, milling, smelting, or other reduction of ores,’  
“ it is necessary to erect hoisting works, to build mills, to  
“ construct smelting furnaces, to secure ample grounds for  
“ dumping waste rock and earth ; and a road to and from  
“ the mine is always indispensable. The sites necessary  
“ for these purposes are oftentimes confined to certain  
“ fixed localities. Now, it so happens, or at least is liable  
“ to happen, that individuals, by securing a title to the  
“ barren lands adjacent to the mines, mills, or works, have  
“ it within their power, by unreasonably refusing to part  
“ with their lands for a just and fair compensation, which  
“ capital is always willing to give without litigation, to  
“ greatly embarrass, if not entirely defeat, the business of  
“ mining in such localities. In my opinion, the mineral  
“ wealth of this state ought not to be left undeveloped for  
“ the want of any quantity of land actually necessary to  
“ enable the owner or owners of mines to conduct and carry  
“ on the business of mining. Nature has denied to this  
“ state many of the advantages which other states possess,  
“ but, by way of compensation to her citizens, has placed  
“ at their doors the richest and most extensive silver de-  
“ posits ever yet discovered. The present prosperity of the  
“ state is entirely due to the mining developments already  
“ made, and the entire people of the state are directly  
“ interested in having the future developments unob-  
“ structed by the obstinate action of any individual or  
“ individuals.”<sup>1</sup>

A like doctrine was affirmed by the same court in a later case, where a mine-owner sought to condemn the land of another for the purpose of sinking a shaft thereon.”

This decision presents the question of “public use,” as applied to the class of state legislation under consideration, in the most favorable light for the mining industry. In its diction it is a classic; in its logic it is persuasive, considering the local conditions existing in that state.

§ 259. **The rule in Arizona.**—The supreme court of Arizona, by a parallel line of reasoning, reached the same

<sup>1</sup> Dayton M. Co. v. Seawell, 11 Nev. 394.

<sup>2</sup> Overman S. M. Co. v. Corcoran, 15 Nev. 147.

conclusions as to the validity of the laws of that territory authorizing the condemnation of land for the purpose of a canal or ditch for irrigating purposes. Said that court. —

"May a state or territory, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation?" This territory is vast in extent, and "rich in undeveloped natural resources. Mountains and deserts are not an inviting prospect when viewed by a stranger in transit. But the mountains abound in the precious metals, gold and silver, 'the jewels of sovereignty'; and the deserts may be made to 'bloom and blossom as the rose.' The one great want is water. With this resource of nature made available, the mountains and the deserts may be made to yield fabulous wealth, and Arizona become the home of a vast, prosperous, and happy people. But with water in this territory 'cribbed, cornered, and confined,' it will continue and remain the mysterious land of arid desert plains, and barren hillsides, and bleak mountain peaks. The legislature of the territory, seeing what was apparent to all, adopted at an early day a policy — 'a general and important public policy.' That policy was to protect against private ownership and monopoly the one thing indispensable to the growth, development, and prosperity of the territory, — the element that would serve to uncover the gold and silver hidden in the hills and mountains, and transform the desert into a garden. . . . The wisdom of this policy, under the physical conditions existing in the territory, must be apparent to every one."<sup>1</sup>

§ 260. **The rule in Georgia.** — The supreme court of Georgia upheld an act of the state legislature creating a private corporation and empowering it to condemn lands for the purpose of enabling it to work its mines for gold or other valuable minerals, by the hydraulic process, thus stating its reasons: —

"Gold and silver is the constitutional currency of the country, and to facilitate the production of gold from the

<sup>1</sup> *Orville v. Goodwin*, 26 Pac. 376, 382.

“ mines in which it is imbedded for the use of the public,  
“ is for the public good, though done through the medium  
“ of a corporation or individual enterprise.

“ The increased production of gold from the mines of  
“ Lumpkin county by the means as provided for in the de-  
“ fendant's charter must necessarily be for the public good,  
“ inasmuch as it will increase for the use of the public a  
“ safe, sound constitutional circulating medium, which is  
“ of vital importance to the permanent welfare and pros-  
“ perity of the people of the State of Georgia, as well as of  
“ the people of the United States.”<sup>1</sup>

We cannot perceive upon what principle, particularly in states like Georgia, the industry of mining should be considered of “ public utility ” any more than the cultivation of the soil and the raising of cotton, sugar-cane, cereals, or any other product so essential to the use of mankind. There may be some plausibility for the rule as announced in Nevada, based, as it is, upon the peculiar conditions existing in that state. But certainly the reasons given by the supreme court of Georgia are neither logical nor persuasive.

§ 261. **The rule in Pennsylvania.**— An act of the legislature of Pennsylvania<sup>2</sup> provided for a right of way across or under rivers or other streams of this commonwealth, for the better and more convenient mining of anthracite coal. The supreme court of that state held the act to be unconstitutional and void, as conferring authority to take private property for private use.<sup>3</sup>

In the case of Edgewood R. R. Co.'s appeal,<sup>4</sup> the same court refused to permit a condemnation of land for a railroad which was a mere appurtenant to a mine, thus stating its views:—

“ The commonwealth transfers to its citizens her power  
“ of eminent domain only when some existing public need  
“ is to be supplied or some present public advantage is to

<sup>1</sup> *Hand G. M. Co. v. Parker*, 59 Ga. 419, 424.

<sup>2</sup> *Purd. Dig.* 1967.

<sup>3</sup> *Waddell's Appeal*, 84 Pa. St. 90.

<sup>4</sup> 79 Pa. St. 257, 269.

"be gained. She does not confer it with a view to contingent results, which may or may not be produced, and "may or may not justify the grant, as a projected speculation may prove successful or disastrous."

§ 262. **The rule in West Virginia** — In West Virginia an act was passed providing that any person owning land having timber upon it, or containing coal, ore, or other minerals, who desires to obtain a subterranean or surface right of way by railroad or otherwise, under, through, or over land belonging to another, for the purpose of mining for such minerals, or conveying such timber or minerals to market, or for the purpose of draining any coal or mineral lands under, through, or over lands belonging to another, might institute proceedings for the condemnation of such lands for such purposes.<sup>1</sup>

Under this act, the Valley City Salt Co., owning some thirty acres of coal land, sought to condemn a subterranean right of way through the land of another, for the purpose of extracting and transporting its coal. The supreme court of West Virginia held that the intended use was strictly private in its nature, and that the right of eminent domain could not be exercised for any such purpose.<sup>2</sup>

§ 263. **The rule in California.**—The supreme court of California has, in several instances, had under consideration a statute of that state which provides that the right of eminent domain may be exercised in behalf of certain enumerated *public* uses, including "tunnels, ditches, flumes, "pipes, and dumping-places for working mines; also, outlets, natural or otherwise, for the flow, deposit, or conduct "of tailings or refuse matter from the mines."<sup>3</sup>

In the case of Consolidated Channel Co. v. C. P. R. R.,<sup>4</sup> the attempt was made by the plaintiff, as the owner of a gold mine, to condemn a right of way for the purpose of

<sup>1</sup> Code W. Va., ch. xliii., §§ 44, 45.

<sup>2</sup> Code Civ. Proc., § 1238.

<sup>3</sup> Valley City Salt Co., 7 W. Va. 191.

<sup>4</sup> 51 Cal. 289.

constructing a ditch and flume, to carry off the tailings from the mine.

“It is clear, [said the court,] that the object sought is “the appropriation of the private property of the defendants “to the private use of plaintiff. The proposed flume is to “be constructed solely for the purpose of advantageously “and profitably washing and mining plaintiff’s mining “ground. It is not even pretended that any person other “than the plaintiff will derive any benefit whatever from “the structure when completed. No public use can possibly be subserved by it. It is a private enterprise, to be “conducted solely for the personal profit of the plaintiff, “and in which the community at large have no concern. “It is clear that this case does not come within the meaning “of that clause of the constitution which permits the taking of private property for a public use. . . . It would “be difficult to suppose a case more completely within the “exception stated, and in which the absence of all possible “public interest in the purposes for which the land is “sought to be condemned is more clear and palpable, than “in the case at bar.”

In *Lorenz v. Jacobs*,<sup>1</sup> the same court held that the right of eminent domain could not be exercised in favor of the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes.

In the case of *Amador Queen M. Co. v. Dewitt*,<sup>2</sup> the plaintiff undertook to condemn the right of way through defendant’s ground, for the purpose of a tunnel to enable plaintiff to extract ore from its mine and transport it to its mill, defendant’s land intervening between plaintiff’s mine and its mill. The federal statute was invoked, as in the Colorado case of *The People ex rel. Aspen M. & S. Co. v. District Court* (*supra*). But the court held that the language of the Revised Statutes of the United States contained no reservation of such right in favor of plaintiff, and that the mine of defendant was his private property, the use for which it was sought to be condemned was a private use, and the proceeding could not be maintained.

<sup>1</sup> 63 Cal. 73.

<sup>2</sup> 73 Cal. 482.

§ 264. **Conclusions.**<sup>1</sup>—While in states and territories surrounded by such physical and industrial conditions as exist in Nevada and Arizona, judicial discretion may, with some show of reason, be exercised in favor of the rule that mining in the hands of individuals is a "public use." Yet such a rule elsewhere is against the logic of the law and the weight of authority.

We may appropriately close this discussion by quoting from the opinions of two distinguished courts as to what constitutes a public use:—

"No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words 'public use,' as found in the different state constitutions regulating the right of eminent domain. The reasoning is in many of the cases as unsatisfactory as the results have been uncertain. The beaten path of precedent, to which courts when in doubt seek refuge, here furnishes no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right. The authorities are so diverse and conflicting that, no matter which road the court may take, it will be sustained, and opposed, by about an equal number of the decided cases. In this dilemma, the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it."

"What, then, constitutes a public use, as distinguished from a private use? The most extended research will not likely result in the discovery of any rule or set of rules or principles of certain and unusual application by which this question can be determined in all cases. Eminent jurists and distinguished writers upon public law do not express concurrent or uniform views upon this subject. It is a question, from its very nature, of great practical, perhaps of insuperable, difficulty, to determine the degree of necessity or the extent of public use which justifies the

<sup>1</sup> In the state of New York mining is of "public utility," for the reason that the ownership of the precious metals is in the state by virtue of its sovereignty, and the fundamental theory is analogous to the doctrine of the civil law. See, *ante*, §§ 19, 11.

<sup>2</sup> *Dayton G. & S. M. Co. v. Seawell*, 11 Nev. 394.

“exercise of this extraordinary power upon the part of a  
“state, by which the citizen, without his will, is deprived  
“of his property.”<sup>1</sup>

<sup>1</sup> Valley City Salt Co. v. Brown, 7 W. Va. 191, 195.



## CHAPTER II.

### LOCAL DISTRICT REGULATIONS.

§ 268. Introductory.		of fact for the jury; their construction a question of law for the court.
§ 269. Manner of organizing districts.		
§ 270. Permissive scope of local regulations.	§ 273. Regulations concerning records of mining claims.	
§ 271. Acquiescence and observance, not mere adoption, the test.	§ 274. Penalty for non-compliance with district rules.	
§ 272. Regulations, how proved— Their existence a question	§ 275. Local rules and regulations before the land department.	

§ 268. **Introductory.**—In the beginning the miners made the laws governing the mining industry, unhampered by congressional or state legislation. In their district assemblages they adopted regulations which covered most of the exigencies of the situation, and frequently much more. They amended, altered, and repealed their rules at will, as changed conditions suggested the necessity, propriety, or convenience. Some of these regulations were wise, and others were otherwise. That these early prospectors were pioneers of extreme western civilization in America, and assisted in laying the foundation of great states, is undoubted. For this they deserve, and have received, full meed of praise. But that they originated a system which is deserving of perpetuation for all time is open to serious question. That there is any reason at the present time for permitting local district regulations of any character, we deny. If congress will not remodel the national mining laws in such a way as to prohibit legislation by local assemblages, the several states and territories should so cover the ground as to render mining districts as law-

making factors not only unnecessary — for that they already are,—but impossible. In a previous chapter,<sup>1</sup> we have traced the origin and noted the general character of district rules and miners' customs during the period when they constituted the American common law of mines. The change in governmental policy wrought by the act of July 26, 1866, and the subsequent legislation crystallizing into the existing system, have circumscribed the limits within which such rules and customs may have controlling force, and they now constitute but a small part in the scheme of mining jurisprudence. When we further consider that in most of the precious-metal-bearing states the legislatures have enacted mining codes of a more or less comprehensive nature, leaving but little to be regulated by district rules, we are forced to recognize the fact that the tendency is towards the absolute elimination of miners' regulations and customs as elements controlling mining rights. Nevertheless, in some states legislation is meager, and the subjects with which district organizations may deal are limited only by the laws of congress. In all of the states and territories, some vestige of power still resides in these local mining communities. Local rules may still be adopted, if they do not contravene congressional or state legislation.<sup>2</sup>

It therefore becomes necessary to deal with them to a limited extent. to consider the field in which they may legitimately be made operative, the manner of their adoption, the manner of proving their existence, and the rules of construction to be applied to them.

**§ 269. Manner of organizing districts.** — With the exception of the state of Wyoming,<sup>3</sup> no attempt has ever been made to prescribe the manner of creating mining districts. They generally come into existence without much formality. Any new discovery attracts prospectors. Usu-

<sup>1</sup> Ch. iii., §§ 40-46.

<sup>2</sup> *Erhardt v. Boaro*, 113 U. S. 527; *Jackson v. Roby*, 109 U. S. 440; *Rosenthal v. Ives*, 12 Pac. 904; *Dutch Flat W. Co. v. Mooney*, 12 Cal. 534; *Flaherty v. Gwinn*, 1 Dak. 509; *Wolsley v. Lebanon M. Co.*, 4 Colo. 112.

<sup>3</sup> Laws 1888, 84.

ally the advance guard is limited in number; but however few, they are sufficient to organize full-fledged districts, and equip them with "rules and regulations" on short notice. The geographical limits are defined, a recorder is elected, and the district is ready for business. When the first or any subsequent set of rules requires amendment, modification, or abrogation, the miners convene at some appointed place, usually upon notice posted, and thus the legislative machinery is set in motion. As we shall see later, the courts do not closely scrutinize methods by which these rules are adopted. This was the primitive way, and for a time served a useful purpose, simply because the necessities of the case demanded and justified it.

Judge W. H. Beatty gives some very excellent reasons for the total abolition of the system:—

"In districts, [said that distinguished jurist,] where the rules are in writing, where they have been some time in force, and generally recognized and respected, the law may be tolerably well settled. But there is often a question whether the rules have been regularly adopted or generally recognized by the miners of a district. There may be two rival codes, each claiming authority and each supported by numerous adherents; evidence may be offered of the repeal or alteration of rules, and this may be rebutted by evidence that the meeting which undertook to effect the repeal was irregularly convened or was secretly conducted in some out-of-the-way corner, or was controlled by unqualified persons; customs of universal acceptance may be proved which are at variance with the written rules; the boundaries of districts may conflict, and within the lines of conflict it may be impossible to determine which of two codes of rules is in force: there may be an attempt to create a new district within the limits of an old one; a district may be deserted for a time, and its records lost or destroyed; and then a new set of locators may reorganize it and relocate the claims. This does not exhaust the list of instances within my own knowledge in which it has been a question of fact for a jury to determine what the law was in a particular district. Other instances might be cited, but I think enough has been said to prove that local regulations, being of no use, ought to be abolished."<sup>1</sup>

<sup>1</sup> Report of Public Land Commission, 188.

§ 270. **Permissive scope of local regulations.**—As to the subjects concerning which district organizations may prescribe rules, or which in any way may be controlled by local customs in the absence of state legislation, Judge W. H. Beatty, then chief justice of the supreme court of Nevada, now chief justice of the supreme court of California, in his testimony given before the public land commission,<sup>1</sup> gave it as his opinion that under the existing laws of congress the miners *may*, in the absence of state legislation,—

*First*—Restrict themselves to smaller claims than the the maximum allowed by acts of congress;

*Second*—Require claims to be more thoroughly marked than would be absolutely necessary to satisfy the terms of the law;

*Third*—Require more work than the law requires;

*Fourth*—Provide for the election of a recorder and the recording of claims.

This is in consonance with section twenty-three hundred and twenty-four of the Revised Statutes.

As to the first three points, said the judge, it may be safely assumed that no such regulations will be adopted in any district hereafter organized. As to the fourth, under existing legislation, local rules are worse than useless. The monuments on the ground do well and completely what the notice and record do only imperfectly and in part.

But the fact remains that miners *may* make rules, that they *do* organize districts, perhaps as a matter of precedent and habit, and with vague notions as to the legitimate scope within which they may act. Much of the adjudicated law upon this subject is now obsolete, and a critical review of the decisions applicable to the primitive conditions is neither necessary nor justifiable. A few illustrations as to what local districts might *not* do may not be out of place.

<sup>1</sup> Report of Public Land Commission, 397.

It was always exacted that a local rule should be reasonable.<sup>1</sup> A local mining custom or regulation adopted after the location of a claim could not be given in evidence to limit the extent of a claim previously located.<sup>2</sup> But where changes were made in local rules with reference to amount of work to be done to perpetuate rights, or providing methods by which such work was condoned, prior locators were called upon to comply with the new regulations as a condition to the continuance of their rights.<sup>3</sup>

Rights held and sanctioned by general laws could not be divested by mere local rules and neighborhood customs.<sup>4</sup> Nor could rules and customs authorize acts amounting to a public nuisance.<sup>5</sup>

Prior to 1860, in California and Nevada, a written instrument was not required to transfer a mining claim. During that period evidence of local customs permitting such transfer by parol, accompanied by delivery of possession, was admissible.<sup>6</sup> But since that date conveyances in writing are necessary throughout the mining regions.<sup>7</sup>

Perfected mining locations are now considered as property in the highest sense of the term, and the rules applicable to other real estate govern their transfer. Neither such transfer nor its recordation is now subject to regulation by local customs.

Where a state or territory has passed laws on any given

<sup>1</sup> *King v. Edwards*, 1 Mont. 235; *Flaherty v. Gwinn*, 1 Dak. 509.

<sup>2</sup> *Table Mountain T. Co. v. Stranahan*, 31 Cal. 387; *Roach v. Gray*, 16 Cal. 383.

<sup>3</sup> *Strang v. Ryan*, 46 Cal. 33.

<sup>4</sup> *Waring v. Crow*, 11 Cal. 367, 372; *Dutch Flat W. Co. v. Mooney*, 12 Cal. 234.

<sup>5</sup> *Woodruff v. North Bloomfield M. Co.*, 9 Saw. 441.

<sup>6</sup> *Jackson v. Feather River W. Co.*, 14 Cal. 19; *Table Mountain T. Co. v. Stranahan*, 20 Cal. 199; *Gatewood v. McLaughlin*, 23 Cal. 178; *Patterson v. Keystone M. Co.*, *Id.* 575, 30 Cal. 360; *Antoine Co. v. Ridge Co.*, 23 Cal. 219, 222; *Hardenberga v. Bacon*, 33 Cal. 356, 381; *Goller v. Fett*, 30 Cal. 421; *Folger v. Coward*, 35 Cal. 652; *Gore v. McBrayer*, 18 Cal. 582; *King v. Randlett*, 33 Cal. 318; *Kinney v. Con. Virginia M. Co.*, 4 Saw. 382, 452; *Union S. M. Co. v. Taylor*, 100 U. S. 37; *Lockhardt v. Rollins*, 2 Idaho. 503.

<sup>7</sup> *Garthe v. Hart*, 73 Cal. 541; *Moore v. Hamerstag*, 109 Cal. 122; *Hopkins v. Noyes*, 4 Mont. 550.

subject within the privilege granted by the federal laws, to that extent, at least, the districts are powerless. Where a state or territory, by its general law, has only partially exercised its privilege of supplemental legislation, district regulations may, in turn, supplement such legislation within the field not covered by state or territorial laws, if within the sanction of the federal laws.

§ 271. **Acquiescence and observance, not mere adoption, the test.**—As heretofore observed, it is not necessary that any rules or regulations should be adopted. Compliance with the federal law and state legislation, if any, is sufficient.<sup>1</sup> But when adopted, and acquiesced in, if not in conflict with federal or state legislation, they have the force of positive law,<sup>2</sup> and substantial compliance with them is essential to a perfect mining title.<sup>3</sup>

As a rule, courts will not inquire into the regularity of the modes by which miners adopt their local rules, unless fraud or some other like cause be shown. It is enough that they agree upon their laws, and that they are recognized as the rules.<sup>4</sup>

Local regulations do not acquire operative force by mere adoption, but from customary obedience and acquiescence of the miners following the enactment;<sup>5</sup> and they become void whenever they fall into disuse or are generally disregarded.<sup>6</sup>

A custom to be binding ought to be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what is required.<sup>7</sup>

<sup>1</sup>Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

<sup>2</sup>Mallett v. Uncle Sam M. Co., 1 Nev. 203; Gropper v. King, 4 Mont. 367; Rush v. French, 1 Ariz. 99; Gird v. California Oil Co., 60 Fed. 531, 535; McCormick v. Varnes, 2 Utah, 355.

<sup>3</sup>Gleeson v. Martin White M. Co., 13 Nev. 443; Becker v. Pugh, 18 Colo. 243; King v. Edwards, 1 Mont. 235; Sullivan v. Hense, 2 Colo. 424; Donahue v. Meister, 88 Cal. 121.

<sup>4</sup>Gore v. McBrayer, 18 Cal. 583, 589.

<sup>5</sup>North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 106; Harvey v. Ryan, 42 Cal. 626.

<sup>6</sup>North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 106.

<sup>7</sup>Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 106, 111.



§ 272. **Regulations, how proved**—**Their existence a question of fact for the jury; their construction a question of law for the court.**—Judicial notice cannot be taken of the rules, usages, and customs of a mining district, and they should be proved at the trial, like any other fact, by the best evidence that can be obtained respecting them.<sup>1</sup> The record books of the district into which written rules are transcribed are, of course, the best evidence as to such rules, and if lost or destroyed, secondary evidence is admissible.<sup>2</sup> But this record will not prove itself. It must be produced by the proper officer, and its authenticity as such established.<sup>3</sup>

Where copies of district rules are sought to be introduced in evidence, it is necessary that it should appear that they come from the proper repository, and that such custodian was empowered to give certified copies, and that such were copies of the laws prevailing and in force in the district.<sup>4</sup>

All of the written rules making up the body of the local law constitute one entire instrument; and it is necessary to a fair understanding of any one part that the whole should be inspected.<sup>5</sup>

Parol evidence of a mining custom cannot be given when there are written rules or regulations of the mining district in force on the same subject.<sup>6</sup> But if the proof renders it doubtful as to whether or not the written rules are in force, both the written laws and parol evidence of the mining customs may be offered in evidence.<sup>7</sup>

The existence of a custom relating to a subject not covered by the written laws, such as posting a notice on a claim, as an act indicating appropriation, may, of course, be shown.<sup>8</sup>

<sup>1</sup> *Sullivan v. Hense*, 2 Colo. 424.

<sup>2</sup> *Id.* 425; *Campbell v. Rankin*, 99 U. S. 261.

<sup>3</sup> *Roberts v. Wilson*, 1 Utah, 292.

<sup>4</sup> *Harvey v. Ryan*, 42 Cal. 626; *Roberts v. Wilson*, 1 Utah, 292.

<sup>5</sup> *English v. Johnson*, 17 Cal. 108, 119; *Roberts v. Wilson*, 1 Utah, 292.

<sup>6</sup> *Ralston v. Ploverman*, 1 Idaho, 595.

<sup>7</sup> *Colman v. Clements*, 23 Cal. 245.

<sup>8</sup> *Harvey v. Ryan*, 42 Cal. 626.



Rules and regulations once proven to have been adopted and acquiesced in, a presumption arises that they continue in force until something appears showing that they have been repealed or have fallen into disuse, and another practice has been generally adopted and acquiesced in.<sup>1</sup>

The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused.<sup>2</sup> Such fact may be proved by a series of circumstances and conditions in the district.<sup>3</sup>

The existence of mining customs may be proved, however recent the date or short the duration of their establishment. The common law doctrine as to customs in such cases does not govern.<sup>4</sup>

Whether a given rule or custom is in force at any given time, is a question of fact to be determined by the jury.<sup>5</sup> But the court must construe the rule;<sup>6</sup> and it shall be so construed as to harmonize with the entire body of the mining law,<sup>7</sup> including all other rules in force in the district.<sup>8</sup>

There is no distinction between the effect of a "custom," or usage, the proof of which must rest in parol, and a "regulation," which may be adopted at a miners' meeting, and embodied in a written local law.<sup>9</sup>

<sup>1</sup> North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 308; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107; Riborado v. Quang Pang Co., 2 Idaho, 131.

<sup>2</sup> North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 308.

<sup>3</sup> Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112; Flaherty v. Gwinn, 1 Dak. 509.

<sup>4</sup> Smith v. North American M. Co., 1 Nev. 337, 359.

<sup>5</sup> North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112; King v. Edwards, 1 Mont. 235; Poujade v. Ryan, 21 Nev. 449; Golden Fleece v. Cable Cons. M. Co., 12 Nev. 312; Sullivan v. Hense, 2 Colo. 424; Harvey v. Ryan, 42 Cal. 626.

<sup>6</sup> Fairbanks v. Woodhouse, 6 Cal. 434; Ralston v. Plowman, 1 Idaho, 395.

<sup>7</sup> Leet v. John Dare M. Co., 6 Nev. 218.

<sup>8</sup> English v. Johnson, 17 Cal. 108, 119; Roberts v. Wilson, 1 Utah, 292.

<sup>9</sup> Harvey v. Ryan, 42 Cal. 626, 628; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 106; Doe v. Waterloo M. Co., 70 Fed. 455, 459; Flaherty v. Gwinn, 1 Dak. 509.

Some of the courts have held that a discoverer has a reasonable time to perfect his location after discovery, in the absence of a state statute or local rule fixing the time.<sup>1</sup> In such cases, it is said, the court may consider evidence of a general custom upon this subject prevalent in different sections of the mining regions as to what constitutes a reasonable time, following the principle announced in early days as to what was a reasonable extent of ground embraced in a mining location, in the absence of any local rule fixing it.<sup>2</sup>

§ 273. **Regulations concerning records of mining claims.**—The mining laws of congress do not require any notice or certificate of location to be recorded. In the absence of some state or territorial law, or local rule or custom, providing for such record, it is unnecessary,<sup>3</sup> and proof of recording, without some regulation or custom requiring it, is irrelevant and inadmissible.<sup>4</sup>

If a notice is required, by either state law or local rules, to be recorded, it must contain all the requisites prescribed by section twenty-three hundred and twenty-four of the Revised Statutes.<sup>5</sup>

The popular understanding of the requirements of the mining law is, that notices of location should be recorded somewhere. This has led to an almost universal custom in

<sup>1</sup> *Doe v. Waterloo M. Co.*, 70 Fed. 455; *Gleason v. Martin White M. Co.*, 13 Nev. 443; *Golden Fleece M. Co. v. Cable Cons. M. Co.*, 12 Nev. 312, 329.

<sup>2</sup> *Table Mountain T. Co. v. Stranahan*, 20 Cal. 199.

<sup>3</sup> *Haws v. Victoria Copper Co.*, 160 U. S. 303; *North Noonday M. Co. v. Orient M. Co.*, 8 Saw. 299, 311; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 111, 114; *Southern Cross M. Co. v. Europa M. Co.*, 15 Nev. 383; *Anthony v. Jilson*, 83 Cal. 296; *Gregory v. Pershbaker*, 73 Cal. 109; *Thompson v. Spray*, 72 Cal. 528; *Souter v. Maguire*, 78 Cal. 543; *Freezer v. Sweeney*, 8 Mont. 308; *Carter v. Baegainpi*, 83 Cal. 187; *Fuller v. Harris*, 29 Fed. 814; *Allen v. Dunlap*, 33 Pac. 675; *Gird v. California Oil Co.*, 60 Fed. 531; *Moore v. Hamerstag*, 109 Cal. 122. *Contra*: *Secretary Hoke Smith, Rose Lode Claims*, 22 L. D. 83.

<sup>4</sup> *Golden Fleece M. Co. v. Cable Cons. M. Co.*, 12 Nev. 312.

<sup>5</sup> *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291; *Gleason v. Martin White M. Co.*, 13 Nev. 443; *North Noonday M. Co. v. Orient M. Co.*, 8 Saw. 299, 312; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 112; *Poujade v. Ryan*, 21 Nev. 449.

states where there are at present no laws or regulations on the subject of recording all such notices in the county recorder's office of the several counties. The county recorder's books, showing records of such claims in any considerable number, are competent evidence, as tending to establish such custom and its general observance.<sup>1</sup> But such custom, to be binding, ought to be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what was required as to the place of record.<sup>2</sup> When such a custom has been generally followed and acquiesced in, it gives the record validity, and entitles it, or certified copies of it, to be introduced in evidence; but a failure to record would not work a forfeiture of the claim, or make it subject to relocation.<sup>3</sup>

Where such custom has become recognized and generally observed, the records of the county recorder, besides tending to establish a regulation sanctioning the recording of mining claims, also furnish evidence of a persuasive character, tending to show in many instances that local written regulations at one time formally adopted, and never formally repealed, have fallen into disuse. Instances of this character are found in several of the mining counties of California, and undoubtedly elsewhere. Prior to the passage of the act of May 10, 1872, written regulations adopted at a miners' meeting limited the width of lode claims to one hundred feet on each side of the lode, and provided for recording with a district recorder. After the passage of this act, it seems that, almost uniformly, location notices were recorded with the county recorder; and from such records it appeared that the new locations invariably claimed the statutory limit of three hundred feet on each side of the center of the vein. There can be no doubt that these records should be considered as competent evidence tending to establish the fact that the local rules had become obsolete, and were no longer of controlling force.

<sup>1</sup> *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30.

<sup>2</sup> *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 111.

<sup>3</sup> See *post*, § 274.

**§ 274. Penalty for non-compliance with district rules.**

— While it has been frequently said that a forfeiture may be worked for failure to comply with local rules,<sup>1</sup> the supreme court of California at an early date announced the doctrine that —

“The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as a result of the non-compliance with such of them as make a non-compliance a cause of forfeiture”<sup>2</sup>

This doctrine was acquiesced in, in a later case, decided by the same court,<sup>3</sup> and reaffirmed at a still later date by the same tribunal, in the following terms:—

“The objection taken to this instruction is that it directs the jury to find for the defendants, if they find from the evidence that the plaintiff had failed to comply with certain regulations, without accompanying the same with a further charge as to whether these rules and regulations declared a forfeiture as the result of such non-compliance. The failure of a party to comply with a mining rule or regulation can not work a forfeiture, unless the rule itself so provides. There may be rules and regulations which do not provide that a failure to comply with their provisions shall work a forfeiture. If so, a failure will not work a forfeiture; hence, in charging the jury upon a question of forfeiture, the charge should be narrowed to such rules as expressly provide that a non-compliance with their provisions shall be cause of forfeiture.”<sup>4</sup>

These decisions of the California court were accepted by the supreme court of Arizona,<sup>5</sup> and by the late Judge Sawyer, circuit judge of the ninth circuit.<sup>6</sup>

The supreme court of Montana, however, while conceding that the decisions in California generally deserve great

<sup>1</sup> *Mallett v. Uncle Sam M. Co.*, 1 Nev. 203; *Oreanus v. Uncle Sam M. Co.*, 1 Nev. 179; *St. John v. Kidd*, 26 Cal. 264; *Deputy v. Williams*, 26 Cal. 310.

<sup>2</sup> *McGarrity v. Byington*, 12 Cal. 427.

<sup>3</sup> *English v. Johnson*, 17 Cal. 108, 117.

<sup>4</sup> *Bel v. Bed Rock T. & M. Co.*, 36 Cal. 214.

<sup>5</sup> *Johnson v. McLaughlin*, 4 Pac. 130, 132; *Rush v. French*, 1 Ariz. 99.

<sup>6</sup> *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 117. See, also, *Flaherty v. Gwinn*, 1 Dak. 509, 511.

weight upon the subject of mining, expresses the opinion that upon this particular point they are far from satisfactory, and declines to follow them.<sup>1</sup>

The existing mining laws, however, relieve to a large extent the embarrassments which might flow from a conflict of opinion on this subject, particularly with reference to the performance of annual labor and the result of non-compliance with the terms of the law. As to other matters within the scope of local regulation which may be considered of minor importance, we think the California rule, as was said by the supreme court of Arizona, "is a safe and conservative rule of decision, tending to the permanency and security of mining titles."<sup>2</sup>

Forfeitures have always been deemed in law odious, and the courts have universally insisted upon their being clearly established before enforcing them.<sup>3</sup>

We shall have occasion to again consider this subject in another portion of this treatise, in connection with the perpetuation of estates acquired by location.

**§ 275. Local rules and regulations before the land department.**—In proceedings to obtain patents under the mining laws, it devolves upon the land department, in the absence of adverse claims, and suits brought to determine them, to decide what rules and regulations are in force in a given district, and its decision upon the subject is final.<sup>4</sup>

As a rule, the land department has followed closely the doctrines announced by the courts in the mining regions, in applying and construing local customs and regulations. In suits upon adverse claims, where most of the questions arise, the local courts determine the facts and apply the law, and their judgment is a guide to the land department

<sup>1</sup> King v. Edwards, 1 Mont. 235, 241.

<sup>2</sup> Johnson v. McLaughlin, 4 Pac. 130, 133.

<sup>3</sup> Hammer v. Garfield M. & M. Co., 130 U. S. 291; Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439; Belcher Cons. M. Co. v. Deferari, 62 Cal. 160; Quigley v. Gillett, 101 Cal. 462; Johnson v. Young, 18 Colo. 625; Book v. Justice M. Co., 58 Fed. 106.

<sup>4</sup> Parley's Park M. Co. v. Kerr., 130 U. S. 256, 262.

in the issuance of patents. We do not encounter in the decisions of this department much that is instructive at the present time, as applied to existing conditions.





## **TITLE V.**

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### **OF THE ACQUISITION OF TITLE TO PUBLIC MINERAL LANDS BY LOCATION, AND PRIVILEGES INCIDENT THERETO.**

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#### **CHAPTER**

#### **II. INTRODUCTORY — DEFINITIONS.**

#### **II. LODE CLAIMS, OR, DEPOSITS, "IN PLACE."**

#### **III. PLACERS AND OTHER FORMS OF DEPOSIT NOT "IN PLACE."**

#### **IV. TUNNEL CLAIMS.**

#### **V. COAL LANDS**

#### **VI. SALINES.**

#### **VII. MILLSITES.**

#### **VIII. EASEMENTS.**



## CHAPTER I.

### INTRODUCTORY — DEFINITIONS.

#### ARTICLE I. INTRODUCTORY.

II. "LODE," "VEIN," "LEDGE."

III. "ROCK IN PLACE."

IV. "TOP," OR "APEX."

V. "STRIKE,"—"DIP," OR "DOWNWARD COURSE."

#### ARTICLE I. INTRODUCTORY.

§ 280. Introductory.

§ 281. Division of the subject.

§ 282. Difficulties of accurate definition.

§ 280. **Introductory.**—In the preceding chapters of this treatise we have endeavored to determine what lands are subject to appropriation under the mining laws, to outline the general nature of the legal system which sanctions such appropriation, and to designate the persons who may or may not under this system acquire, hold, and enjoy rights upon the mineral lands of the public domain. We are now to consider the manner in which such rights may be acquired, and the acts necessary to be done and performed as a condition precedent to such acquisition.

§ 281. **Division of the subject.**—Some of the requirements of the law are general in their nature, and apply with equal force to all classes of mineral deposits. Others, by reason of the nature of the thing to be appropriated, or on account of a difference in governmental policy respecting it, are essentially of special application to individual groups. The embarrassments surrounding the

arrangement of the subject for the purpose of philosophical, or even methodical, treatment are not to be underestimated. The body of the mining law is complex and incongruous, illogically arranged, and inharmoniously blended. Perhaps the mere form in which the subject is presented is of minor importance, and may be left to the discretion of the author without furnishing justification for serious criticism. At the same time, some orderly method should be adopted by which the practitioner or student may find the state of the law from the author's standpoint, on any given branch, without reading the work from preface to appendix. A comprehensive index may lessen the evil flowing from a want of systematic arrangement, but this cannot wholly supply the necessity for grouping individual classes, and treating them separately, when their nature will permit. We think the object will be fairly accomplished by the division and distribution of the subject into the following heads:—

- (1) Lode claims, or the appropriation of deposits “in place”;
- (2) The appropriation of claims usually called “placers,” and other forms of deposit not “in place”;
- (3) Tunnel claims;
- (4) Coal lands;
- (5) Salines;
- (6) Millsites;
- (7) Easements.

§ 282. **Difficulties of accurate definition.**—Before entering upon the formal discussion of the mode of acquiring mining rights upon the public domain, there are certain words and phrases of such frequent occurrence in the mining laws that some attempt at defining them is advisable. In analyzing these various laws and their judicial interpretation by the courts, we encounter numerous terms, but few, if any, of which are susceptible of exact definition. By

"exact definition" we mean one that contains every attribute which belongs to the thing defined, and excludes all others. While definitions are more or less essential, to avoid repetition and the necessity for frequent descriptive explanation of the sense in which such words and phrases are used and of the ideas they are intended to convey, it is not to be expected that absolute exactitude will be obtained. The circumstances surrounding the employment of the terms and the conditions to which they are to be applied are so variable that differentiation will be frequently found necessary. As Judge Hawley, one of the most experienced and distinguished judges in the mining states, said, that while there was no conflict in the decisions, yet the result is that some definitions have been given in some of the states that are not deemed applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state.<sup>1</sup>

The old maxim, that definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so, finds ample justification when the attempt is made to define the words and phrases of a more or less technical character in the mining statutes. As Judge Field observed in the Eureka case,<sup>2</sup> it is difficult to give any definition of some of the terms as used and understood in the acts of congress which will not be subject to criticism. Many of these terms, said Judge Phillips, are not susceptible of arbitrary definition; nor are they capable of being defined by one set phrase so unvarying as to apply to every case, regardless of the differing conditions of locality and mineral-deposit.<sup>3</sup> Even if such a result could be reached, "important questions of law are not to be determined by a slavish adherence to the letter of arbitrary definition."<sup>4</sup>

It is our purpose to present such definitions of the terms found in the mining statutes as have been formulated by

<sup>1</sup> Book v. Justice M. Co., 58 Fed. 106.

<sup>2</sup> Eureka Cons. M. Co. v. Richmond M. Co., 4 Saw. 302, 311.

<sup>3</sup> Cheesman v. Shrove, 40 Fed. 792.

<sup>4</sup> Duggan v. Davey, 4 Dak. 110, 140.

lexicographers and writers upon geological subjects, together with those approved by the various tribunals charged with the administration and judicial construction of these laws. It is possible that with this aggregation no individual case may arise which will suffer for lack of a suitable definition.

## ARTICLE II. “LODE,” “VEIN,” “LEDGE.”

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| <p>§ 286. English and Scotch definitions.</p> <p>§ 287. As defined by the lexicographers.</p> <p>§ 288. As defined by the geologists.</p> <p>§ 289. Elements to be considered in the judicial application of definitions.</p> <p>§ 290. The terms “lode,” “vein,” “ledge” legal equivalents.</p> | <p>§ 291. Classification of cases, in which the terms “lode,” and “vein” are to be construed.</p> <p>§ 292. Judicial definitions, and their application — The Eureka case.</p> <p>§ 293. The Leadville cases.</p> <p>§ 294. Other definitions given by state and federal courts.</p> |
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**§ 286. English and Scotch definitions.** — We are indebted to Mr. Archibald Brown for the following:—

“A mineral lode, or vein, is a flattened mass of metallic or earthy matter, differing materially in its nature from the rocks or strata in which it occurs. Its breadth varies from a few inches to several feet, and it extends in length to a considerable distance, but often with great irregularity of course. It is often perpendicular, or nearly so, in its position, and descends in most cases to an unknown depth. Sometimes the sides are parallel, and sometimes they recede from each other so as to form large accumulations, or, as they are called, bellies, of mineral matter; and occasionally they approach each other so as almost, if not wholly, to cause the vein to disappear. Veins also traverse each other, and smaller ones ramify or spring out from the larger.”<sup>1</sup>

And to Mr. Ross Stewart for the following:—

“‘Vein,’ ‘seam,’ ‘lode,’ which appear to signify the same thing, viz: a layer or stratum of material of a different nature from the stratification in which it occurs,

<sup>1</sup> Bainbridge on Mines, 4th ed. 7.

“are equivalent to the term ‘mine,’ when by it is understood an unopened mine.”<sup>1</sup>

We do not find the term discussed in Collyer, Arundel, or Rogers. MacSwinney contents himself with definitions given by the lexicographers, without venturing to formulate one of his own.

§ 287. **As defined by the lexicographers.—**

*Century Dictionary:*—

“LODE. A metalliferous deposit, having more or less of a veinlike character; that is, having a certain degree of regularity, and being confined within walls. *Lode*, as used by miners, is nearly synonymous with the term *vein*, as employed by geologists. The word would not be used for a flat or stratified mass.”

“VEIN. An occurrence of ore, usually disseminated through a gangue, or veinstone, and having a more or less regular development in length, width, and depth. A vein and a lode are, in common usage, essentially the same thing, the former being rather the scientific, the latter the miners’ name for it.”

“LEDGE. In mining, *ledge* is a common name in the Cordilleran region for the lode, or for any outcrop supposed to be that of a mineral deposit or vein. It is frequently used to designate a quartz vein.”

*Webster’s Dictionary:*—

“LODE. A metallic vein; any regular vein or course, whether metallic or not.”

“LEDGE. A lode; a limited mass of rock, bearing valuable mineral.”

“VEIN. A narrow mass of rock intersecting other rocks, and filling inclined or vertical fissures not corresponding with the stratification; a lode; a dike;—often limited, in the language of miners, to a mineral vein or lode; that is, to a vein which contains useful minerals or ores.

“A fissure, cleft, or cavity, as in the earth or other substance.”

*Standard Dictionary:*—

“LODE. A somewhat continuous unstratified metal-bearing vein.”

<sup>1</sup> Stewart on Mines, 3.



“VEIN. The filling of a fissure or fault in a rock, particularly if deposited by aqueous solutions. When metalliferous, it is called by miners a *lode*. . . . A bed or shoot of ore parallel with the bedding.”

“LEDGE. A metal-bearing rock-stratum; a quartz vein.”

*Richardson's Dictionary*:—

“VEINS. Lineal streaks in mineral.”

*Encyclopedia Britannica*:—

“VEINS. Fissures or cracks in the rocks which are filled with materials of quite a different nature from the rocks in which the fissures occur.”

### § 288. As defined by the geologists.—

*Dana*:—

“VEINS are the fillings of fissures, or of open spaces made in any way, exclusive of those called *dikes*, which are due to intrusions of melted rock.<sup>1</sup> Where ores occur along a vein, it is, in miners' language, a *lode*.”<sup>2</sup>

*Geike*:—

“Into the fissures opened in the earth's crust there have been introduced various simple minerals and ores, which, solidifying there, have taken the form of mineral veins.

“A true mineral vein consists of one or more minerals filling up a fissure, which may be vertical, but is usually more or less inclined, and may vary in width from less than an inch up to one hundred and fifty feet or more.”<sup>3</sup>

*Le Conte*:—

“All rocks, but especially metamorphic rocks, in mountain regions are seamed and scarred in every direction, as if broken and again mended, as if wounded and again healed. All such seams and scars are often called by the general name of *veins*. True veins are accumulations, mostly in fissures, of certain mineral matters, usually in a purer and more sparry form than they exist in the rocks.”<sup>4</sup>

<sup>1</sup> Dana's Manual of Geology, 4th ed. (1895), 327.

<sup>2</sup> *Id.* 331.

<sup>3</sup> Geike's Geology (1886), 275.

<sup>4</sup> Le Conte's Elements of Geology (1895), 234.

*Van Cotta*.—

As quoted in the Eureka case, Van Cotta defines a *lode* as a fissure in the earth's crust filled with mineral matter, an aggregation of mineral matter containing ore in a fissure.

**§ 289. Elements to be considered in the judicial application of definitions—Rules of interpretation.—**

Dr. Raymond, one of the expert witnesses whose evidence is quoted and referred to in the Eureka case, thus states his views.—

"The miners made the definition first. As used by 'miners, before being defined by any authority, the term 'lode' simply meant that formation by which the miner 'could be led or guided. It is an alteration of the verb 'lead,' and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode."<sup>1</sup>

At the time the act of July 26, 1866, was passed, the first congressional enactment wherein the words "lode" and "vein" were used, the center of activity in the mining industry was found in the auriferous quartz belt of California, and the Comstock lode, in Nevada. Up to that time there is but little doubt that the experience of the western miner in lode mining was, with rare exceptions, confined to a class of deposits that would readily fall within the scientific definition of a "lode"; that is, "a fissure in the earth's crust filled with mineral matter; an aggregation of mineral matter containing ore in a fissure."

Dr. Raymond is of the opinion that the term was used by the miner in a more enlarged sense, because "cinnabar" was included in the category of minerals specified in the statute, and "cinnabar" occurs not in fissure veins, but as "impregnations and masses of ore distributed through zones of rock."<sup>2</sup>

<sup>1</sup> Eureka case, 4 Saw., 302, 311.

<sup>2</sup> Monograph in Eureka Richmond Case, Trans. Am. Inst. Min. Eng., vol. vi, 382. See, also, Dr. Raymond's testimony, quoted by the court in the Eureka case, 4 Saw., 302, 311.

When it is considered that up to the year 1866 the quicksilver product of the Pacific slope (and it does not occur elsewhere in the United States), was confined to three mines, two of which were then claimed under Mexican grants—the New Almaden, in Santa Clara county, California, and the New Idria (Panoche Grande), in Fresno county, California,—and that active search for cinnabar deposits was not inaugurated until 1874,<sup>1</sup> popular knowledge on the subject of the mode of occurrence was not particularly extended. It is more than likely that “cinnabar” was, in popular estimation, found in fissures, the same as gold and silver, and that the association of cinnabar with gold and silver in the act arose out of ignorance of the true character of its occurrence, rather than a deliberate attempt to classify it in the category of lodes, with a full knowledge as to the form in which it was found.” Be that as it may, the miner first applied the terms “lode” and “vein,” and they had with him a definite meaning. Whether it accorded with scientific theories and abstractions is, at this late day at least, of no serious moment.

Speaking of the essential differences between the miner and the scientist on the subject of definitions, Dr. Foster, in his contribution to the “Quarterly Journal of the Geological Society,” on the Great Flat lode in Cornwall, quoted by Dr. Raymond in his monograph on the Eureka-Richmond case,<sup>3</sup> presents some suggestions on the subject of the definition of these terms which are worthy of repetition here:—

“The terms ‘lode,’ or ‘mineral vein,’ commonly regarded “as synonymous, are usually taken to mean the mineral “contents of a fissure. I have endeavored to show that

<sup>1</sup> Becker's *Geology of the Quicksilver Deposits of the Pacific Slope*, pp. 10, 11.

<sup>2</sup> The ignorance of many of the early miners of California on geological subjects is thus quaintly suggested by Mr. J. Ross Browne (*Mineral Resources of the West*, 1867):

“Many believed that there must be some volcanic source from which “the gold had been thrown up and scattered over the hills; and they “thought that if they could only find that place, that they would have “nothing to do but to shovel up the precious metal and load their mules “with it.”

<sup>3</sup> *Trans. Am. Inst. Min. Eng.*, vol. vi., p. 371, 381.

“ the Great Flat lode is in the main a band of altered rock.  
“ Much of the veinstone extracted from some of the largest  
“ Cornish mines, such as Dolcoath, Cook’s Kitchen, Tincroft,  
“ Carn Brea, and Phœnix, for instance, closely resembles the  
“ contents of the Great Flat lode, and was probably formed  
“ in a similar manner; indeed, I question very much whether  
“ at least half the tin ore of the country is not obtained  
“ from tabular masses of stanniferous altered granite. If,  
“ then, many of the important lodes of such classic ground  
“ as Cornwall do not satisfy the common definition, one of  
“ two things ought to be done; either the miner should  
“ give up the term ‘lode’ for these repositories, or else the  
“ meaning attached to the word by geologists should be  
“ extended. I need hardly say that the first alternative is  
“ not likely to be adopted; nor do I think it is one to be  
“ recommended—for I believe that one and the same fissure  
“ traversing killas and granite may produce two kinds of  
“ lodes. . . . I should propose, therefore, that the term  
“ ‘lode,’ or ‘mineral vein,’ should include not only the con-  
“ tents of fissures, but also such tabular masses of metallif-  
“ erous rock, as those I have been describing. . . . If,  
“ however, this course should be thought on the whole unde-  
“ sirable, the geologist and miner must agree to differ in  
“ their language, and some of the *lodes* of the latter will  
“ have to be designated as tabular stockworks by men of  
“ science.”

We do not conceive that from a judicial standpoint it is a matter of vital importance that the miner and the scientist should harmonize their differences on the subject of mere definition. The danger lies in accepting the definitions of either, and attempting to apply them to conditions not within the reasonable contemplation of the law, or in attempting to deprive a locator of the benefit of his discovery, if the thing discovered can not be forced into the mold of arbitrary definition, either popular or scientific.

If in the construction of the terms used in the mining laws there is one evil to be avoided as great as the servile adherence to arbitrary definition, it is the blind application of a rule announced in one case, where local conditions may justify it, to other cases, where a similar application of the rule, by reason of modified or totally different conditions, would produce absurd results.

As was said by Judge Hawley, sitting as circuit judge in the case of *Book v. Justice M. Co.*,—

“Various courts have at different times given a definition of what constitutes a vein, or lode, within the meaning of the act of congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits, or vein matter, and of the country rock, in the particular district where the claims are located.”<sup>1</sup>

And in a later case:—

“The mining laws of the United States were drafted for the purpose of protecting the *bona fide* locators of mining ground and at the same time to make necessary provision as to rights of agriculturists and claimants of townsite lands. The object of each section and of the whole policy of the entire statute should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the facts and a difference in the character of the cases and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court. . . . The definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district.”<sup>2</sup>

As was said by Judge Field, speaking of the act of July 23, 1866,—

The mining acts “were not drawn by geologists or for geologists. They were not framed in the interest of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose.”<sup>3</sup>

<sup>1</sup> 58 Fed. 106, 121.

<sup>2</sup> *Migeon v. Montana Cent. Ry.*, 77 Fed. 249, 254.

<sup>3</sup> *Eureka Case*, 4 Saw. 302, 311.

§ 290 The terms "lode," "vein," "ledge," legal equivalents.—The act of July 26, 1866, used the term "vein, or "lode." The act of May 10, 1872, added the word "ledge," and all these terms occur in the Revised Statutes.

Of the three terms, the word "lode" is the more comprehensive. A lode may, and often does, contain more than one vein.<sup>1</sup> Instances have been known of a broad zone, generally recognized as a lode, itself having well-defined boundaries, but being traversed by mineralized fissure veins, each possessing such individuality as to be the subject of location.<sup>2</sup> A lode may or may not be a fissure vein, but a fissure vein is, in contemplation of law, a lode.

"Ledge" is more of a local term, at one time in common use in California and some parts of Nevada. It is mentioned in the act of May 10, 1872, and is incorporated into the Revised Statutes, but it is practically unrecognized in many mining localities.

Generally speaking, the terms are used interchangeably.<sup>3</sup> As observed by Dr. Raymond, "lode" is an alteration of the verb "lead." In many localities the word "lead" is used as synonymous with "lode." "Lead" is also applied in California to certain subterranean auriferous gravel deposits, which, however, can be acquired only under the placer laws,<sup>4</sup> according to the rules established by the land department. The terms "lode" and "vein" are always associated in the existing mining statutes, and are invariably separated by the disjunctive. For all practical purposes, they may be considered as legal equivalents. Unless the authority cited itself makes the distinction heretofore suggested, the definitions hereafter given apply equally to both words.

<sup>1</sup> *United States v. Iron S. M. Co.*, 128 U. S. 673.

<sup>2</sup> *Mt. Diablo M. & M. Co. v. Callison*, 5 Saw. 439. See, also, *Doe v. Waterloo M. Co.*, 54 Fed. 935.

<sup>3</sup> *Iron S. M. Co. v. Cheesman*, 8 Fed. 297, 301; *Cheesman v. Shrave*, 40 Fed. 787, 792; *Morr. Min. Rights*, 8th ed. 113.

<sup>4</sup> *Gregory v. Pershbaker*, 73 Cal. 109.

§ 291. **Classification of cases in which the terms “lode” and “vein” are to be construed.**—Judge Hawley, speaking for the circuit court of appeals in the case of *Migeon v. Montana Cent. Ry.*,<sup>1</sup> says:—

“There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein, within the intent and meaning of different sections of the Revised Statutes:—

“(1) Between miners who have located claims on the same lode, under the provisions of section twenty-three hundred and twenty;

“(2) Between placer and lode claimants, under the provisions of section twenty-three hundred and thirty-three;

“(3) Between mineral claimants and parties holding townsite patents to the same ground;

“(4) Between mineral and agricultural claimants to the same land.”

To these we may add another:—

(5) Controversies between a lode miner, who has penetrated into and underneath lands adjoining in the development of what he has located under the law applicable to lode claims, and the adjoining or neighboring surface proprietor, whose claim to the underlying mineral deposits rests solely upon presumptions flowing from surface ownership.

In interpreting these terms the nature of the controversy is an undoubted element to be considered. In some classes of cases a more liberal rule is followed than would be justified in others. It is useless in our judgment to search for a judicial definition which would be absolutely applicable under every conceivable state of facts and in all classes of controversies.

§ 292. **Judicial definitions and their application — The Eureka case.**—It may be safely asserted that as to the terms “lode” and “vein,” when applied to geological conditions existing in most mining localities, there is no essential difference between their definition as given by

<sup>1</sup> 77 Fed. 249, 254.



the scientist and that applied by the practical miner. But it is when we encounter certain classes of deposits, and meet with new and unique conditions, the existence of which was neither known nor contemplated when the "miners made the definitions," nor when congress enacted the mining laws, that the courts have been forced to admit that "what constitutes a lode, or vein, of mineral matter" has been no easy thing to define."<sup>1</sup>

The first reported case in which a judicial definition of any of these terms was attempted is the case of the Eureka M. Co. v. Richmond M. Co.,<sup>2</sup> one of the most famous of the mining cases ever considered by the courts. It was tried before three of the most eminent mining judges—Field, Sawyer, and Hillyer,—who had the benefit of the testimony of some of the most distinguished scientists of the period.

It was a case involving rights accruing under the act of 1866, and the following is the definition formulated:—

"We are of the opinion that the term (lode) as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes . . . all deposits of mineral matter found through a mineralized zone, or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

The zone to which this definition was applied was of dolomitic limestone, a sedimentary deposit, broken, crushed, and fissured, resting on a foot-wall of quartzite, and having a hanging-wall of clay shale. The width of the zone varied from a few inches to four hundred and fifty feet. Its mean width was about two hundred and fifty feet. The hanging-wall had a dip of eighty to eighty-five degrees, while the foot-wall had an average inclination of forty-five degrees. Throughout this body of limestone, vugs, chambers, and large caverns were encountered, in the bottoms of which ore,—lead carbonates, carrying gold and silver,—was invari-

<sup>1</sup>Iron S. M. Co. v. Cheesman, 116 U. S. 529.

<sup>2</sup>4 Saw. 792. Judge Field, in Iron S. M. Co. v. McKee & Sarr G. & S. M. Co., 143 U. S. 394.

ably found. Overlying the hanging-wall was another zone of limestone, which differed from that lying on the quartzite, being plainly stratified, and contained neither ores nor caverns.

No one connected with the case contended that it was a fissure.<sup>1</sup>

While we are not concerned with the genesis of these ore deposits, it is a matter of common knowledge that the inclosing rock (limestone) being soluble, the caves, vugs, and chambers resulted from the chemical action of percolating waters creating space for the subsequent deposit of the ores.

Professor Le Conte, in his “Elements of Geology,”<sup>2</sup> gives a cross-section, exhibiting a homely illustration of the result of the erosive action of the water in rocks of this character, and cites the Mammoth Cave, in Kentucky, Wier’s Cave, in Virginia, and Nicojack Cave, in Tennessee, as examples. Our apology for introducing these elements into the discussion is found in the admonition of the courts, referred to in a preceding section, that in applying a definition we must look to the facts, circumstances, and conditions of structural geology which justified its creation, before we can intelligently determine whether it should be applied to other cases.

We do not complain that the law was incorrectly applied in the Eureka case. But there is hardly a mining case of any considerable importance in which one side or the other does not attempt to apply the zone theory announced in this case to conditions wholly different from those encountered on Ruby Hill.

The Eureka case stands as a forensic classic; but its force as a precedent ought to be limited to cases where the conditions are parallel, or at least analogous.

The passage of the act of May 10, 1872, introduced new terms, and created new complications, which must be considered when dealing with the present state of the law.

<sup>1</sup>See monographs of W. S. Keyes and R. W. Raymond, Trans. Am. Inst. Min. Eng., vol. vi., pp. 344, 393.

<sup>2</sup>3d ed. 76.

§ 293. **The Leadville cases.**<sup>1</sup> - We shall have occasion to analyze the group of cases arising out of the unique geological conditions existing at and in the vicinity of Leadville, Colorado, when we discuss the subject of "apex" in the succeeding article, presenting a cross-section which gives a fair illustration of the mode in which these so-called "veins" occur. As we shall there fully explain our understanding of these local conditions to which definitions have been applied, we confine ourselves presently to quotations from these various cases, most all of which refer to and apply to the Eureka case. -

In general, it may be said that a lode, or vein, "is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain."<sup>2</sup>

"In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode."<sup>3</sup>

"Such boundaries constitute a fissure and if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a lode, or vein. . . .

"A continuous body of mineral or mineral-bearing rock extending through loose, disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation."

<sup>1</sup>For a full presentation and discussion of these cases, see Dr. Raymond's Law of the Apex.

<sup>2</sup>Judge Hildett, in *Iron S. M. Co. v. Cheesman*, 8 Fed. 299, 301, quoted by Justice Miller in *Stevens & Leder v. Williams*, 1 McCrary, 480, 488.

<sup>3</sup>Quoted in *Cheesman v. Shreve*, 40 Fed. 787, 795.

<sup>4</sup>Judge Hildett, as quoted and approved in *Iron S. M. Co. v. Cheesman*, 116 U. S. 529; *United States v. Iron S. M. Co.*, 128 U. S. 674. See, also, *Hyman v. Wheeler*, 29 Fed. 347, 353; *Illinois S. M. Co. v. Raff*, 34 Pac. (N. Mex.), 544.

“The thinness or thickness of the matter in particular places does not affect its being a vein or lode. Nor does the fact that it is occasionally found in the general course of the vein or shoot, in pockets deeper down in the earth, or higher up, affect its character as a vein, lode, or ledge.”<sup>1</sup>

“By veins, or lodes, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock. Yet a lode may, and often does, contain more than one vein.”<sup>2</sup>

“With ore in mass and position in the body of the mountain, no other fact is required to prove the existence of a lode or the dimensions of the ore. As far as it prevails, the ore is a lode; and it is not at all necessary to decide any question of fissures, contacts, selvages, slickensides, or other marks of distinction, in order to establish its character.”<sup>3</sup>

“It has sometimes been contended that the lode must have a certain position in the earth: that is to say, it must be more or less vertical, before this rule which is given in the act of congress can be applied; but we have heretofore held, and we are still of the opinion, that it applies to all lodes which have an inclination below the plane of the horizon, whatever it may be.”<sup>4</sup>

In *Stevens & Leiter v. Williams*<sup>5</sup> is found the following by Judge Hallett:—

“As to the word ‘vein,’ or ‘lode,’ it seems to me that these words may embrace any description of deposit which is so situated in the general mass of the country, whether it is described in any one way or another; that is to say, whether, in the language of the geologist, we say it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit. . . . Whenever a miner finds a valuable mineral deposit in the body of the earth (in place) he calls that a lode, whatever its form may be, and however it may be situated, and whatever its extent in the body of the earth.”

<sup>1</sup> Justice Miller, in *Stevens & Leiter v. Williams* (second trial), 1 Morr. Min. Rep. 573.

<sup>2</sup> *United States v. Iron S. M. Co.*, 128 U. S. 673.

<sup>3</sup> *Hyman v. Wheeler*, 29 Fed. 347, 353; *Cheesman v. Shreve*, 40 Fed. 795.

<sup>4</sup> *Leadville M. Co. v. Fitzgerald*, 4 Morr. Min. Rep. 380.

<sup>5</sup> 23 Fed. Cases, No. 13, 414.

The same judge, in another case, held that an impregnation to the extent to which it may be traced as a body of ore is as fully within the broad terms of the act of congress as any other form of deposit.<sup>1</sup>

While the supreme court of the United States, in the cases of *Iron S. M. Co. v. Cheesman*,<sup>2</sup> *United States v. Iron S. M. Co.*,<sup>3</sup> and *Reynolds v. Iron S. M. Co.*,<sup>4</sup> had accepted the definition of a lode, or vein, announced by Judge Hallett, thus determining that the blanket deposits of Leadville were in law embraced within the definition of the terms "lode" and "vein," their position was vigorously assailed in the later case of *Iron S. M. Co. v. Mike & Starr G. & S. M. Co.*<sup>5</sup> This case was twice argued, a re-argument having been ordered, and the attention of counsel directed to the question, among others, as to what constituted a vein or lode within the meaning of sections twenty-two hundred and twenty and twenty-three hundred and thirty-three of the Revised Statutes. The action was brought by the plaintiff in error as the owner of the William Moyer placer to eject the defendant. The defense was "known lode" existing at the time of the application for the placer patent, called the Goodell lode. The verdict was for the lode claimant. Plaintiff appealed. The judgment was affirmed by the supreme court of the United States, in an opinion from which we quote —

"There was an earnest inquiry . . . as to whether in view of the disclosures made in this, as in prior cases, of the existence of a body of mineral underlying a large area of country in the Leadville mining district, whose general horizontal direction, together with the sedimentary character of the superior rock, indicated something more of the nature of a deposit, like a coal-bed, than of the vertical and descending fissure vein in which silver and gold are ordinarily found, it did not become necessary to hold that the only provisions of the statute under which title to any portion of this body of mineral or the ground in which it is situated can be acquired are those with respect to placer claims. . . .

<sup>1</sup> *Hyman v. Wheeler*, 20 Fed. 347, 354.    <sup>2</sup> 128 U. S. 673.    <sup>3</sup> 143 U. S. 394.

<sup>4</sup> 116 U. S. 520.

<sup>5</sup> 116 U. S. 687.

“Our conclusions are that the title to portions of this  
“horizontal vein or deposit—“blanket vein,” as it is gener-  
“ally called—may be acquired under the sections concern-  
“ing veins, lodes, etc. The fact that so many patents have  
“been obtained under these sections, and that so many appli-  
“cations for patent are still pending, is a strong reason  
“against a new and contrary ruling. That which has  
“been accepted as law, and acted upon by that mining  
“community for such a length of time, should not be  
“adjudged wholly a mistake and put entirely aside be-  
“cause of difficulties in the application of some minor  
“provisions to the peculiarities of this vein or deposit.”

Judges Field, Harlan, and Brown dissented, but not as to the legal conclusions. They were of the opinion that the evidence was insufficient to establish the existence of a “known lode.”

The embarrassing results flowing from this decision will be demonstrated when we discuss the question of apex and extralateral rights.

**§ 294. Other definitions given by state and federal courts.**—The supreme court of Montana has given the following definition:—

“In construing this language, regard must be had to  
“what in truth a lode, or lead, is, and when so tested the  
“problem seems easy of solution and free from doubt. A  
“lead, or lode, is not an imaginary line without dimen-  
“sions; it is not a thing without shape or form. But  
“before it can legally and rightfully be denominated a  
“lead, or lode, it must have length, and width, and depth;  
“it must be capable of measurement; it must occupy  
“defined space, and be capable of identification. Before  
“a quartz claim can be legally located, a lead, or lode,  
“containing gold or silver must be discovered; and before  
“such discovery can be called a discovery, at least one  
“well-defined wall,<sup>1</sup> or side, to the lode must be found.  
“What, then, is a quartz lode? It is a fissure, or seam, in  
“the country rock, filled with quartz matter, bearing gold  
“or silver. This fissure may be wide or narrow; it varies  
“in width from one inch, or even less, to one hundred feet,

<sup>1</sup> At the time this case was decided, a law existed in Montana making it a prerequisite to a valid location that the workings should disclose at least one wall.



"or much more. The sides of a lead are represented and "defined by the walls of the country rock, and these walls "must be discovered, and the lead identified thereby, be- "fore it can be located and held as a lead."<sup>1</sup>

Judge Hawley, sitting as circuit judge in the ninth cir-  
cuit, after reviewing most of the adjudicated law upon the  
subject, thus expressed his views:—

"This statute was intended to be liberal and broad  
"enough to apply to any kind of a lode, or vein of quartz  
"or other rock bearing mineral, in whatever kind, charac-  
"ter, or formation the mineral might be found. It should  
"be so construed as to protect locators of mining claims  
"who have discovered rock in place, bearing any of the  
"precious metals named therein, sufficient to justify the  
"locators in expending their time and money in prospect-  
"ing and developing the ground located." It must be borne  
"in mind that the veins and lodes are not always of the  
"same character. In some mining districts the veins,  
"lodes, and ore deposits are so well and clearly defined as  
"to avoid any questions being raised. In other localities  
"the mineral is found in seams, narrow crevices, cracks, or  
"fissures in the earth, the precise extent and character of  
"which can not be fully ascertained until expensive ex-  
"plorations are made, and the continuity of the ore and  
"existence of the rock in place, bearing mineral, is estab-  
"lished. It never was intended that the locator of a  
"mining claim must determine all these facts before he  
"would be entitled, under the law, to make a valid loca-  
"tion. Every vein, or lode, is liable to have barren spots  
"and narrow places, as well as rich chimneys and pay  
"chutes, or large deposits of valuable ore. When the loca-  
"tor finds rock in place containing mineral, he has made a  
"discovery within the meaning of the statute, whether the  
"rock or earth is rich or poor, whether it assays high or  
"low. It is the finding of the mineral in the rock in  
"place, as distinguished from float rock, that constitutes  
"the discovery, and warrants the prospector in making a  
"location of a mining claim."<sup>2</sup>

And in a later case, speaking for the circuit court of  
appeals,—

<sup>1</sup> Foote v. National M. Co., 2 Mont. 403.

<sup>2</sup> Quoted in Wyoming Cons. M. Co. v. Champion M. Co., 63 Fed. 540, 544.

<sup>3</sup> Boak v. Justice M. Co., 58 Fed. 106, 126, commented on and reaffirmed  
in Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 544.



“When a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low.”<sup>1</sup>

In *Hyman v. Wheeler*,<sup>2</sup> Judge Hallett, after referring to the decisions in some of the Leadville cases, adds the following:—

“An impregnation to the extent to which it may be traced as a body of ore is as fully within the broad terms of the act of congress as any other form of deposit.”

Some of the courts accept the liberal interpretation suggested by Dr. Raymond in the Eureka case—that a lode is whatever a miner could follow and find ore.”<sup>3</sup>

Others lean to the scientific definition—that it is a seam or fissure in the earth’s crust, filled with quartz or other rock in place, carrying gold, silver, etc.<sup>4</sup>

In a case arising in Nevada, at Treasure Hill, where the formation is limestone, and the conditions were parallel to those existing in the Eureka case, the supreme court of that state held that the term “lode” might be applied to ore deposits in a succession of chambers connected by a seam, varying in width, and more or less barren, and with walls of different character.<sup>5</sup>

All cases seem to agree that neither the size<sup>6</sup> nor the richness of the ore<sup>7</sup> is an element of the definition.<sup>8</sup>

<sup>1</sup> *Migeon v. Mont. Cent. Ry.*, 77 Fed. 249, 255.

<sup>2</sup> 29 Fed. 347, 353.

<sup>3</sup> *Harrington v. Chambers*, 1 Pac. 362, 375; *Burke v. McDonald*, 2 Idaho, 310; *Shreve v. Copper Bell M. Co.*, 11 Mont. 309; *Brownfield v. Bier*, 15 Mont. 403.

<sup>4</sup> *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299, 309; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 107; *Foote v. National M. Co.*, 2 Mont. 402; *Stinchfield v. Gillis*, 96 Cal. 33.

<sup>5</sup> *Phillipotts v. Blasdel*, 8 Nev. 62.

<sup>6</sup> *Stinchfield v. Gillis*, 96 Cal. 33; *Stevens v. Leiter & Williams*, 1 Morr. Min. Rep. 566; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 107; *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299, 309.

<sup>7</sup> *Stinchfield v. Gillis*, 96 Cal. 33; *Book v. Justice M. Co.*, 58 Fed. 106; *Migeon v. Mont. Cent. Ry.*, 77 Fed. 249.

<sup>8</sup> *Golden Terra M. Co. v. Mahler*, 4 Morr Min. Rep. 390; *Armstrong v.*

As to whether a given deposit is a vein, or lode, is a question of fact.<sup>1</sup>

### ARTICLE III. "ROCK IN PLACE."

§ 298. Classification of lands containing valuable deposits.	§ 300. The blanket deposits of Leadville.
§ 299. Use of term "in place" in the mining laws.	§ 301. Judicial interpretation of the term "rock in place."

**§ 298. Classification of lands containing valuable deposits.**—The laws of the United States prescribing the terms upon which its lands containing valuable deposits, other than coal and salines, shall be sold, used, or occupied, have divided such lands into two distinct classes:—

(1) Those which contain veins, or lodes of quartz or of other rock in place,<sup>2</sup>

(2) Those containing placers and other forms of deposit other than those found "in place."<sup>3</sup>

To determine the proper manner of appropriating public lands containing such valuable deposits, it is necessary to first ascertain whether they are found in veins, or lodes of rock in place, or not. If of rock in place, a method is to be pursued differing from that applicable to other deposits, and the nature and extent of rights conferred by the appropriation of one class differ in some respects from those conferred by the other. It becomes necessary to arrive at an understanding of what is meant by "rock in place."

Lower, 6 Colo. 393; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 108; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 300.

<sup>1</sup> Bluebird M. Co. v. Largey, 49 Fed. 289; Bolton B. & C. M. Co. v. Eureka H. M. Co., 5 Utah, 3; Idaho S. M. Co. v. Raff, 34 Pac. (New Mex.), 544.

<sup>2</sup> Rev. Stats., § 2320.

<sup>3</sup> *Id.*, § 2329. Justice Miller, in *Stevens & Leiter v. Williams*, 1 Morr. Min. Rep. 596, 572; Gen. Circ. Inst. July 15, 1873, Copp's Min. Dec. 316, 318.

§ 299. **Use of term “in place” in the mining laws.**—A vein, or lode, is necessarily “in place.” The condition of being “in place” is one of its essential attributes. The term “quartz, or other rock in place,” as used in section twenty-three hundred and twenty of the Revised Statutes, refers to its constituent elements, or the “filling” of veins and lodes. Experience has shown that mineral substances in veins, or lodes, are not always found in quartz. Sometimes the vein material is composed of the same character of rock as the inclosing walls—the nature of the occurrence of mineral being in the form of impregnations, penetrating the country rock, or the mineral may be but a replacement of the original rocks. So the statute recognizing that while the material of most veins consists of quartz, yet, as this is not universally true, the alternative, “or other rock in place,” was introduced. As quartz in a vein is rock in place, the statute would have been equally as comprehensive if instead of saying “veins, or lodes of quartz or other rock in place,” it had simply said, “veins, or lodes of rock in place.”

The term “rock in place,” occurs in all of the mining legislation of congress. There is nothing cabalistic in its use. It is simply the *in situ* of the geologist, and as explained by the commissioner of the general land office in the mining circulars issued by him, the term has always received the most liberal construction of which the language would admit. Every class of claims that either according to scientific accuracy or popular usage can be classed and applied for as a vein or lode may be patented under the law, as a vein or lode of rock in place.<sup>1</sup>

In this class the commissioner included all lands wherein the mineral matter is contained in veins or ledges occupying the original *habitat*, or location, of the metal or mineral, whether in true or false veins, in zones, in pockets, or in the several other forms in which minerals are found in the *original rock*.<sup>2</sup>

<sup>1</sup>Commissioner Drummond (July 20, 1871), Copp's Min. Dec. 46.

<sup>2</sup>Copp's Min. Dec. 316, 319; 1 Copp's L. O. 11.

Petroleum is said to be "in place" when it occupies the undisturbed position in the earth between the inclosing rocks, where it was placed by natural processes; and so with subterranean salt water.<sup>1</sup>

Ordinarily, there should be but little difficulty in determining whether a given deposit is a vein or lode of rock in place or not. But circumstances have arisen which have provoked discussion as to what is meant by the term "in place," and it has frequently occupied the attention of the courts.

§ 300. **The blanket deposits of Leadville.**—The blanket deposits at and in the vicinity of Leadville, Colorado, have given rise to most of the controverted questions on the subject of "lodes," "veins," "in place," "top," and "apex"; and the burden of solving many of these difficulties in the first instance fell to the lot of Judge Hallett. His decisions have furnished the text for other courts, in other jurisdictions, where analagous conditions have been to a limited extent encountered.

The conditions which created the necessity for a rule of interpretation to be applied to the term "in place" is thus stated by the distinguished judge:—

"Until the discovery of mineral deposits near Leadville no controversy had arisen in Colorado as to whether a lode, or vein, is in place within the meaning of the act of congress.

"The mines opened in Clear Creek, Gilpin, Boulder, and other counties, descend into the earth so directly that no question could arise whether they were inclosed in the general mass of the country; whatever the character of the vein, and whatever its width, it was sure to be within the general mass of the mountain; but the Leadville deposits were found to be of a different character. In some of them at least, the ore was found on the surface or covered only by the superficial mass of slide, debris, detritus, or movable stuff which is distinguishable from the general mass of the mountain, while others were found beneath an overlying mass of fixed and immovable rock which

<sup>1</sup> Williamson v. Jones, 39 W. Va. 231, 257.

" could be called a wall as well as that which was found  
" below them. It then became necessary to consider very  
" carefully the meaning of the words 'in place' in the act  
" of congress, in order to determine whether these deposits  
" were of the character described in that act."<sup>1</sup>

As the character of these deposits are frequently involved in the discussion of numerous phases of the mining law, we think it advisable to give a short account of the nature of their occurrence. Much has been written upon them, and the scientists are by no means harmonious as to the theory of their origin. On the question of structural geology, however, there is but little room for controversy. The records of geological history exposed in the mine workings are read by all alike; and there is a general consensus of opinion as to what is there found. Professor Emmons thus states the result of his investigations:—

" By far the most important of the ores of Leadville  
" and vicinity, both in quantity and quality, occur in the  
" blue-gray dolomitic limestone, known as blue or ore-  
" bearing limestone, and at or near its contact with the  
" overlying sheet of white porphyry. They thus constitute  
" a sort of contact sheet whose upper surface, being formed  
" by the base of the porphyry sheet, is comparatively regu-  
" lar and well defined, while the lower surface is ill-defined  
" and irregular, there being a gradual transition from ore  
" into unaltered limestone, the former extending to vary-  
" ing depths from the surface, and even occupying at times  
" the entire thickness of the blue limestone. This may be  
" regarded as the typical form of the Leadville deposits;  
" there are, however, variations from it, and also in the  
" character of the inclosing rock, which do not necessarily  
" involve any difference in origin or mode of formation.  
" As variations in form, the ore sometimes occurs in irregu-  
" larly shaped bodies, or in transverse sheets, not always  
" directly connected with the upper or contact surface of  
" the ore-bearing bed or rock. It also occurs at or near  
" the contact of sheets of gray or other porphyries with  
" the blue limestone, and less frequently in sedimentary  
" beds, both calcareous and silicious and in porphyry  
" bodies, sometimes on or near contact surfaces, sometimes  
" along joint or fault planes. . . .

<sup>1</sup>Leadville M. Co. v. Fitzgerald, 4 Morr. Min. Rep. 381.

"The material of which they were composed was not a deposit in a pre-existing cavity in the rock, but the solutions, which carried them, gradually dissolved out the original rock material and left the ore or vein material in its place . . .

"The mineral solutions or ore currents concentrated along natural water channels, and followed by preference the bedding planes at a certain geological horizon, but they also penetrated the adjoining rocks through cross-joints and cleavage planes."<sup>1</sup>

A glance at the geological atlas accompanying this monograph shows that in many portions of this mineral belt these deposits lie in a position approaching the horizontal, sometimes forming a basin, at others alternating in anticlinal and synclinal folds, shown in an emphasized form in figure 14.<sup>2</sup>

In places erosion has carried off the overlying porphyry, leaving the vein material lying between the bedding of limestone and superficial deposit of slide and detritus. The continuity of the vein material is frequently interrupted by faults and intrusive dikes as well as by a broken or "jumbled-up" condition of the country rock. This is substantially the character of deposits with which the courts are confronted in the application of the mining laws.

§ 301. **Judicial interpretation of the term "rock in place."**—In some of Judge Hallett's decisions he speaks of the *lode* being "in place." Notably, in the case of *Stevens & Leiter v. Williams*,<sup>3</sup> where that distinguished jurist uses the following language:

"As to the meaning of these words 'in place,' they seem to indicate the body of the country which has not been affected by the action of the elements, which may remain in its original state and condition as distinguished from the superficial mass which may lie above it . . . And when the act speaks of veins or lodes *in place*, it means such as lie in fixed position in the general mass

<sup>1</sup>Geology and Mining Industry of Leadville, 375, 378.

<sup>2</sup>See, *post*, § 302.

<sup>3</sup>1 Morr. Min. Rep. 508, 559, 560.

“ of country rock or in the general mass of the mountain.  
 “ . . . Now, whenever we find a vein, or lode, in this  
 “ general mass of country rock we may be permitted to say  
 “ that it is *in place*, as distinguished from the superficial  
 “ deposit; and that is true, whatever the character of the  
 “ deposit may be — that is to say, as to whether it belongs to  
 “ one class of veins or another; it is *in place* if it is held in  
 “ the embrace, is inclosed by the general mass — of the  
 “ country.”

. . . . .

“ It is not material as to the character of the vein matter  
 “ whether it is loose and disintegrated or whether it is  
 “ solid material. In these lodes the earth that is found in  
 “ them, the earthy matter which may be washed or treated  
 “ with water or steam, is often the most valuable part.

“ It was never understood here or elsewhere, so far as  
 “ I know, that such earthy matter was not embraced in  
 “ the location because it was of that character. It is the  
 “ surrounding mass of country rock; it is that which  
 “ incloses the lode, rather than the material of which it is  
 “ composed, which gives it its character. So that, even if  
 “ it be true, as counsel have stated in the course of their  
 “ arguments, that this is mere sand, is a loose and friable  
 “ material, which can not be called rock, in the strict defi-  
 “ nition of the word — if that be true, it does not affect the  
 “ character of the lode. If it were all of that character, it  
 “ would still be a vein or lode *in place* if the wall on each  
 “ side, the part which holds the lode, is fixed and immov-  
 “ able.”

And in *Stevens v. Gill*,<sup>1</sup> he says: —

“ The act of congress speaks of veins or lodes *in place*,  
 “ by which, according to our interpretation, it is required  
 “ that the vein, or lode, shall be in the general mass of the  
 “ mountain. It may not be on the surface or covered only  
 “ by movable parts, called slide or *debris*. But if it is in  
 “ the general mass of the mountain, although the inclos-  
 “ ing rocks may have sustained fracture and dislocation in  
 “ the general movement of the country, it is *in place*.”<sup>2</sup>

<sup>1</sup> 1 Morr. Min. Rep. 576, 580.

<sup>2</sup> See, also, *Leadville M. Co. v. Fitzgerald*, 4 Morr. Min. Rep. 381;  
*Stevens & Leiter v. Murphey*, 4 Morr. Min. Rep. 380.



The judge does not give the exact language of the statute, which is "veins, or lodes, of quartz or other rock in place."

Dr. Raymond, in his "Law of the Apex," calls attention to the misquotation. But it seems to us that, taken in connection with Judge Hallett's other rulings, his intent is manifest.<sup>1</sup>

In the second trial of the Stevens & Leiter case, Justice Miller charged the jury as follows:—

"By 'rock in place' I do not mean merely hard rock, 'merely quartz rock, but any combination of rock, broken up, mixed with mineral and other things, is rock in place, 'within the meaning of the statute.

"I give that instruction [that the mineral must be of 'quartz or other rock'], but with the distinct understanding that all this substance between the porphyry and 'limestone that has been explained to you which contains 'mineral - I mean which contains ore — is *rock in place*."<sup>2</sup>

And in *Iron S. M. Co. v. Cheesman*, Judge Hallett says:—

"Excluding the wash, slide, or *débris*, on the surface of 'the mountain, all things in the mass of the mountain 'are *in place*."

This was quoted and approved by the supreme court of the United States.<sup>3</sup>

The decisions of Judge Hallett and Justice Miller were quoted with approval in a case decided by the supreme court of Nevada, the facts of which and conclusions drawn from them are thus stated in the opinion of the court:—

"A certain formation which the defendant claimed to 'be the ledge had been traced on its inclination outside 'the plaintiff's boundaries, and a large amount of work 'there done upon it. If this was the ledge, as the defendant claimed, it tended to show that its apex was outside 'those boundaries. According to the witnesses, it consisted 'of broken limestone, boulders, low-grade ore, gravel, and 'sand, which appeared to have been subjected to the action 'of water. This was found at a depth of several hundred

<sup>1</sup> See, also, Judge Hallett's definitions of "vein," and "lode," *ante*, § 293.

<sup>2</sup> *Stevens & Leiter v. Williams*, 1 Morr. Min. Rep. 566, 569, 571.

<sup>3</sup> *Iron S. M. Co. v. Cheesman*, 116 U. S. 529, 537. See, also, *Jones v. Prospect Mt. T. Co.*, 21 Nev. 339.

“feet, and where there seems to have been no question that  
 “it was within the original and unbroken mass of the  
 “mountain. So far as was shown, the rock on either side  
 “was fixed, solid, and immovable. Mineral matter so  
 “situated, no matter where it was originally formed or  
 “deposited, is in place within the meaning of the law.  
 “The manner in which mineral was deposited in the  
 “places where it is found is at best but little more than a  
 “matter of mere speculation, and to attempt to draw a  
 “distinction based upon the mode, or manner, or time of  
 “its deposit would be utterly impracticable and useless.  
 “The question was long ago settled by the courts.”<sup>1</sup>

A mere superficial deposit, although originally in place, the overlying rock having been eroded and replaced by *debris* or wash, is not in place.”

Auriferous cement gravel beds found in the channels of ancient rivers, lying upon bed-rock and covered with thick deposits of other gravel, the whole frequently capped with a lava of great thickness, would seem to be “in place” within the definitions heretofore given. But the land department,<sup>3</sup> as well as the courts,<sup>4</sup> treats them as deposits of rock not “in place,” and requires them to be located under the laws applicable to placers.

#### ARTICLE IV. “TOP,” OR “APEX.”

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|--|---|
| § 305. The “top,” or “apex,” of a vein, as a controlling factor in lode locations.<br>§ 303. The term “top,” or “apex,” not found in the miner’s vocabulary. Definitions of the lexicographers.<br>§ 307. Definitions given in response to circulars issued by the public land commission.<br>§ 308. Definition of Dr. Raymond.<br>§ 309. The ideal lode and its apex. | § 310. Illustrations of a departure from the ideal lode — The case of Duggan v. Davey.<br>§ 311. The Leadville cases.<br>§ 312. Hypothetical illustrations based upon the mode of occurrence of the Leadville and similar deposits.<br>§ 313. The existence and <i>situs</i> of the “top,” or “apex,” a question of fact. |
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<sup>1</sup>Jones v. Prospect Mt. T. Co., 21 Nev. 339, 351.

<sup>2</sup>Tabor v. Dexter, 9 Morr. Min. Rep. 614.

<sup>3</sup>Copp’s Min. Dec. 78.

<sup>4</sup>Gregory v. Pershbaker, 73 Cal. 109.

§ 305. The "top," or "apex," of a vein as a controlling factor in lode locations.— The importance of a correct definition of the terms "top," or "apex," or at least a proper application of their definitions to the varying geological conditions encountered in the administration of the mining laws, cannot be overestimated. The top, or apex, of the vein which is the subject of appropriation, is the prime factor in determining the extent of the rights acquired by a lode location. This is apparent when we consider the following requirements of the law:—

- (1) No lode location is valid unless it includes, to some extent at least, within vertical planes drawn through the surface boundaries, the top, or apex, of a discovered vein;
- (2) The right to pursue the vein on its strike ceases at the point where the apex of the vein passes beyond the surface boundaries or vertical planes drawn through them;
- (3) The right to pursue the vein on its downward course out of and beyond vertical planes drawn through the side line, into and underneath the lands adjoining, when this right exists to any degree, can only be exercised to the extent that the top, or apex, of the located vein is found within the surface boundaries of the location, or within vertical planes drawn through them.

It is not our purpose to here discuss these elements. They will be fully considered under appropriate heads in other portions of this treatise. We enumerate them simply to demonstrate the necessity of an accurate understanding of what is meant by the terms "top," or "apex," and the care with which principles announced in one case are to be applied to another.

In the light of the rules announced in the previous articles, if a given mineral deposit is in place, it is a lode. If it is a lode in contemplation of law, it has a top, or apex. While it is not easy in all cases to determine where the apex, or top, is, yet it must exist, otherwise it cannot properly be located as a lode. It cannot be located under the placer laws, because these laws apply only to deposits

*not* in place, and before it can be legally located as a lode, the apex, or top, must be found. If a location is made on the side or on the dip, whoever discovers and properly locates the apex, will be entitled to enjoy the full rights accorded to regular valid lode locations, and the rights of those who have located on the side edge, or dip, must yield.

Most of the difficulties arising from the application of the definition of “top,” or “apex,” to individual instances are accounted for by the fact that the courts of last resort hold certain classes of blanket, or flat, deposits to be “lodes,” thus creating the necessity of determining what is a top, or apex, as applied to such judicially constructed lodes. If it is a lode, it must have an apex; for without it no lode location can be properly made. If it is a lode, or vein, of quartz or other rock in place, it cannot be appropriated under the laws applicable to placers or mere superficial deposits. It is true that after a lode patent is issued, the existence of an apex within the patented ground will be conclusively presumed.<sup>1</sup> Yet it will not be presumed that any particular exposure of the vein is that apex. It must still remain a question of proof.

§ 306. **The terms “top,” or “apex,” not found in the miner’s vocabulary—Definitions of the lexicographers.**—Prior to the passage of the act of July 26, 1866, the terms “vein” and “lode” formed a part of the miners’ vocabulary. They were incorporated into local rules, and their signification was fairly understood throughout the mining regions. The first congressional law on the subject of mining on the public domain was but a crystallization of these rules;<sup>2</sup> and it was no more than natural that when the courts came to construe the terms which had thus found their way into legislative enactments, they should be interpreted according to the understanding of those who first made the definitions and applied them. In

<sup>1</sup> *Iron S. M. Co. v. Campbell*, 17 Colo. 267.

<sup>2</sup> *Jennison v. Kirk*, 93 U. S. 453; *Broder v. Natoma W. Co.*, 101 U. S. 274; *Chambers v. Harrington*, 111 U. S. 274. See, *ante*, § 56.

addition to this, the terms "vein" and "lode" had a recognized scientific meaning which did not differ from the popular one, except as applied to novel and peculiar conditions.

But neither "top" nor "apex" found a place in the miner's glossary at any period in the history of the mining industry, either in the mining regions of the west or elsewhere, nor had they ever been recognized or applied by scientists for the purpose of designating any part of a vein, lode, or mineral deposit of any kind. Neither miner nor geologist is entitled to the credit for their appearance in the public statutes, nor are they to be held responsible for the perplexities and embarrassments surrounding their proper interpretation. Thus left without custom, precedent, or scientific definition to guide them, the only alternative left to the courts was to apply the ordinary rule of interpretation; that is, that words are to be construed according to the ordinary sense in which they are used and understood.<sup>1</sup> To ascertain what is the ordinary sense in which a word is used, we must appeal to the lexicographers.

We quote the definitions of "apex" found in the standard dictionaries:—

*Standard Dictionary:—*

"(1) The pointed or angular end, or highest point, as of a pyramid, spire, or mountain; extreme point; tip; top.

"(2) The vertex of a plane or solid angle.

"(3) The highest point of a stratum; as a coal seam."

*Century Dictionary:—*

"(1) The tip, point, or summit of anything. In *geometry*, the angular point of a cone or conic section. The angular point of a triangle opposite the base.

"(2) In *geology*, the top of an anticlinal fold of strata. This term, as used in United States Revised Statutes, has been the occasion of much litigation. It is supposed to mean something nearly equivalent to outcrop; but precisely in what it differs from outcrop has not been, neither does it seem capable of being, distinctly made out.

<sup>1</sup> Duggan v. Davey, 4 Dak. 110, 140.

*Webster's Dictionary*:—

“ The tip, point, or summit of anything.”

*Soulé's Synonyms*:—

“ Top; summit; acme; zenith; pinnacle; highest point; utmost height.”

§ 307. **Definitions given in response to circulars issued by the public land commission.**—Under an act of congress passed March 3, 1879, a public land commission was appointed for the purpose of codifying the then existing laws relating to the survey and disposition of the public domain, and to make such recommendations as it might deem wise in relation to the best methods of disposing of the public lands. This commission consisted of J. A. Williamson, commissioner of the general land office; Clarence King, director of the geological survey; A. T. Britton, Thomas Donaldson, and J. W. Powell. For the purpose of informing themselves generally on conditions existing in the west, the commissioners issued a circular containing a series of questions, to which answers were received. These circulars were sent to mining engineers, surveyors, lawyers, judges, and practical miners. Under the head of “ Lode Claims,” the fourth question was:—

“ *What do you understand to be the top, or apex, of a vein or lode?* ”

We select from the list of answers quoted by Dr. Raymond in his “ Law of the Apex ”:—

“ The highest point at which the ore or rock is found “ ‘ in place ’ or between the walls of the vein, and not a “ ‘ blow out,’ or part of the ledge broken down outside the “ walls.”

“ The croppings, or the exposed surface of the vein, or “ lode.”

“ The highest point at which it approaches or reaches “ the natural surface of the ground.”

“ The highest point of its outcrop in rock in place.”

“ That point at which the vein enters or emerges from “ rock in place.”



"The top, or apex, is generally understood to be that part of the lode that is first discovered. A vertical lode has its apex at the surface."

"Where the mineral-bearing crevice-matter is first met, either on the surface, or, as in blind lodes, underground; but wherever it is met, there begins the apex."

"The croppings, or highest point of the ledge appearing above or discovered beneath the surface."

"The highest point of the center of the ledge."

"The outcrop in the highest geological level, whether this is accidentally higher or lower than some outcrop caused by denudation, or slip."

"Where it comes through or to the surface of the rock in which it is incased, though it may be covered, and sometimes is, with twenty or thirty feet of loose earth."

"That portion of the lode along its course which outcrops to the surface, or, if 'blind,' which comes nearest to the surface."

"Croppings."

"The line such vein would make in its intersection with the surface, calculated from its true dip at each point"

"The uppermost part of the ledge between the two walls, although these may be missing."

"In case the vein outcrops at the surface, I would call any portion of such outcrop the top, or apex. If the vein does not reach the surface, then the highest point to which the vein, or lode, can be traced is the apex—not necessarily the nearest point to the surface, but the absolute highest point."

"The summit, comb, crest, or highest point on the ridge of a vein, or lode"

"The upper edge; that part which is first reached or passed, in developing a mine."

"The outcrop, or, in case of a blind ledge, that line of the vein, or lode, which approaches the surface the nearest."

"That portion of the vein that is visible in the country rock when the loose dirt or earth has been removed."



“Some veins stand up above the country rock like a wall.  
“The top of such veins would be the highest part of such  
“wall above the ground or bed-rock.”

“Its highest point at any given place.”

“The outcrop.”

“The point at surface where the ore is met with; either  
“superficially seen in the croppings, or just beneath the  
“surface.”

“Either the outcrop or crevice between walls at the top  
“of bed-rock.”

“The vein at the surface.”

“Outcrops generally.”

“The width of the vein, or lode, on the surface; but the  
“United States mining law means the top, or apex, to be  
“the width of the claim, six hundred by fifteen hundred  
“feet.”

“The outcropping of the vein.”

“Where it has been projected through the country rock  
“by an acting subterranean agency or force.”

Judge Beatty, then chief justice of Nevada, gave the  
clearest and most comprehensive of all the definitions. It  
is as follows:—

“The top, or apex, of any part of a vein is found by  
“following the line of its dip up to the highest point at  
“which vein matter exists in the fissure. According to this  
“definition, the top, or apex, of a vein is the highest part of  
“the vein along its entire course. If the vein is supposed  
“to be divided into sections by vertical planes at right  
“angles to its strike, the top, or apex, of each section is the  
“highest part of the vein between the planes that bound  
“that section.” . . .

“Of course, there are irregular mineral deposits depart-  
“ing widely in their characteristics from the typical or  
“ideal vein which seems to have been in the mind of the  
“framer of the act of 1872. To such deposits the forego-  
“ing definitions will not apply; and, in my opinion, great  
“difficulty will be experienced in any attempt to apply  
“the existing law to them.”<sup>1</sup>

<sup>1</sup>Report of Public Land Commission, 399; Dr. Raymond on Law of  
the Apex, 28.

§ 308. **Definition of Dr. Raymond.**—Dr. Raymond, in his "Law of the Apex," with reference to these terms and their use in the act of May 10, 1872, says:—

"I have reason to believe that they were used instead of 'the word 'outcrop,' in order to cover 'blind lodes,' which do not crop out. The conception of an apex, which is properly a point, was probably taken from the appearance of a blind lode in a cross-section, where the walls appear as lines and the upper edge as a point. The term may also have been intended to cover the imaginary case of an ore deposit which terminates upwards in a point. We may, however, dismiss from consideration the case of a simple point, and safely assume that the apex is 'the same as a top, and is either a line or a surface.'"

The definition crystallized by him and found in his "Glossary of Mining and Metallurgical Terms,"<sup>1</sup> is, "the end or edge of a vein nearest the surface."

We think this definition should be qualified to some extent. Our views will be found in the next section.

§ 309. **The ideal lode, and its apex.**—For the purpose of the application of principles and definitions, and furnishing a standard of comparison, we present in figure 4 a vertical cross-section of an ideal lode—such a lode, or vein, as the early miner undoubtedly had in mind when he "made the definitions" and applied the terms "lode" and "vein." This cross-section is intended to represent the

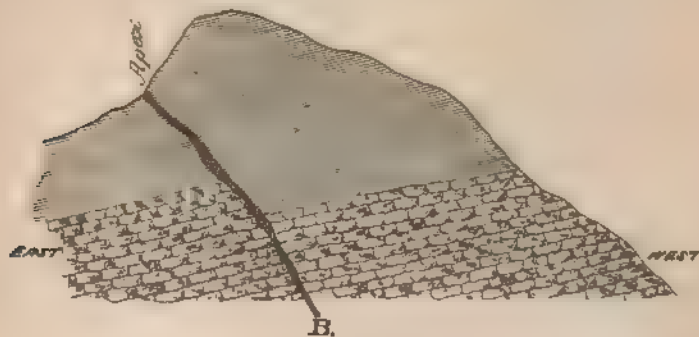


FIGURE 4.

<sup>1</sup>Trans. Am. Inst. Min. Eng., vol. ix., p. 102.

position of the vein in the inclosing rock, descending into the earth in a direction approximating the perpendicular or vertical, crossing in its downward course the planes of stratification, having well-defined foot and hanging-walls, and emerging at the surface at the point marked “apex,” where is found a visible outcrop. This outcrop, we may assume, is exposed on the east slope of the hill, and continues to be traceable on the surface in a regular, defined course for an indefinite distance southerly at right angles to the “dip” or downward course. This hypothetical vein has all the attributes of a true fissure, and may be said to be an ideal vein or lode—one concerning which there can be no possible controversy, as it answers the definition of the judge, the scientist, and the practical miner. Is there any question as to where the apex of that vein is? or what is its strike or course and its dip or downward course? We think not. With the mountain in its normal condition, there is but one method of making a valid location covering that vein, and that is by inclosing the outcrop or apex within surface boundaries, presenting an ideal lode location, shown in the accompanying figure 5.

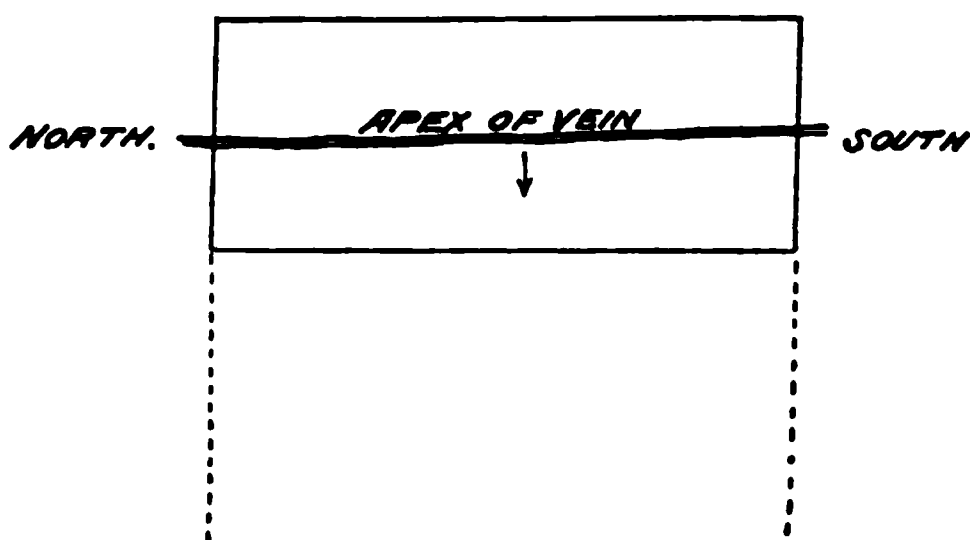


FIGURE 5.

There is no room for controversy over the rights flowing from such a location, either surface or underground, assuming that there are no other prior locations covering the apex of the same vein whose end-line planes might intersect those represented by the figure.

How should the apex of this vein be defined? It is not a point, because a point has neither length nor breadth. It is not a line, because a line has no dimension but length. It is but a succession of points. As that term is employed in the mining laws, an apex is unquestionably a surface which is a succession of lines.

The apex of this ideal vein within the location is a surface bounded by the walls of the vein and the end lines of the location. This surface is, of course, irregular. It may be higher at one place within the boundaries than it is in another; but mere elevation of the upper edge of the vein at different points within the location is of no moment. If the top of the mountain were ground down to a horizontal plane, the vein as exposed would be a plane surface; but, nevertheless, it would be an apex. The fact that the exposed edge of the vein is ragged, or that the surface of the outcrop is higher in one place above a given datum plane than it is in another, makes no difference in the principle.

If this upper edge does not outcrop so as to be visibly traceable on the surface, but is "blind," covered with detritus or a capping of country rock, it is still a surface bounded by the walls of the vein, and vertical planes drawn downward through the end lines. The plane of contact of the upper edge of the vein with the detritus or capping, intersected by the walls of the vein, would be the apex surface. We cannot conceive that an apex of a lode, within the meaning of the act of congress, can be anything but a surface, although we are aware that the supreme court of the United States has said that an apex is often a *line* of great length.<sup>1</sup> But it undoubtedly meant a surface, because in another portion of the same case it speaks of the "apex in its full width." Mathematically speaking, there is no width to a line. As was said by the supreme court of Montana, a lead, or lode, is not an imaginary line without dimensions; it is not a thing without

<sup>1</sup> Larkin v. Upton, 144 U. S. 19, 23.

shape or form. But before it can legally and rightfully be denominated a lead, or lode, it must have length, and width, and depth; it must be capable of measurement; it must occupy defined space, and be capable of identification.<sup>1</sup>

Of course, in speaking of the edge of the vein nearest to the surface, we mean the surface along the course of the vein, the upper edge, and not the lower edge, or side edge. As absolute horizontality does not exist in nature, save in the case of the level of the sea, every vein, lode, or deposit, whatever its form, has either an upper and lower edge, or a top and a bottom, as well as sides. It may be difficult to find them, or to determine their relative position, but they exist, in the nature of things.

To further illustrate, recurring again to figure 4: Suppose that, instead of the mountain being in its normal condition, the north face of the hill was abraded, cut down vertically, as you would cut a cheese, leaving the edge of the vein from the point marked "apex," to the bottom of the vein which may be assumed to be at B, exposed to the observer as we see it in the figure. In other respects, the vein preserves its position in the mountain as described. Will it be seriously contended that the exposure of the edge "apex" to B, constitutes an apex, because it appears at the surface on the perpendicular face of the hill? It has been so claimed. In the case of *Duggan v. Davey*, decided by the supreme court of Dakota, a case soon to be considered by us, it was stated by Professor Dickerman, a distinguished expert, in response to an inquiry as to what would be the apex of a vein cropping out at an angle of one degree from the vertical on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill (which is the case assumed by us with reference to figure 4), that in his opinion the whole line of the exposure from the bottom B upward to the point marked "apex" clear over the hill, as far as it extended, would be the apex of the vein. In other words, one part of the apex surface

<sup>1</sup> *Foote v. National M. Co.*, 2 Mont. 403.

can be perpendicular, or at right angles to the other.<sup>1</sup> Of course, the court declined to follow him.

§ 310. **Illustration of a departure from the ideal lode**  
—**The case of Duggan v. Davey.**—One of the most interesting and instructive of all the adjudicated cases involving the interpretation of the terms “top,” or “apex,” is *Duggan v. Davey*,<sup>2</sup> decided by the supreme court of Dakota. The decision follows, in the main, the opinion given by the trial court. It is a lucid and masterly presentation of the law, and, as presented, affords us an opportunity to illustrate and explain by diagrams the position of the vein in the earth, its exposure on both top and side, the contention of the respective parties as to what constituted the apex, and the conclusions of the court deduced from the facts. It is one of the few cases which affords a full opportunity of explaining by simple methods the true definition of the term “top,” or “apex,” as well as the “strike” and “dip,” and their relationship one to the other. Entertaining these views as to the importance of the case, we are justified in presenting it fully.



FIGURE 6.

Figure 6 is a perspective, showing an edge or outcrop of the vein exposed along the western face of Custer Hill, traversing it in a northerly and southerly direction, and an edge or outcrop traversing the northern slope in an easterly and westerly direction. We take the following description from the opinion of the trial court:—

<sup>1</sup> *Duggan v. Davey*, 4 Dak. 110, 140.

<sup>2</sup> 4 Dak. 110.

The western slope of the hill presents a lateral face from south to north, along the line of the outcrop, of thirteen hundred feet. At its northern extremity it turns to the east, and its northern slope presents a lateral face from west to east of upwards of three thousand feet. Along its base and following it in this turn in the direction indicated is a small stream called Bare Butte creek. These slopes are quite steep, and extend from base to summit about twelve hundred to thirteen hundred feet. The whole country is hilly and broken, and the hill is only one of a series of similar elevations, with which it is more or less directly connected.

Beginning at or near the southern extremity of the western slope of Custer Hill, at a point (marked *x* on figure 6) half way up the slope, there is found an outcropping layer or stratum of reddish quartzite, or metamorphic sandstone, of several feet in thickness, overlaid by a body or stratum of limestone or dolomitic shale, of a thickness not definitely ascertained. From this point the croppings may be readily traced in several places by high reef-like ledges, jutting out boldly from the face of the hill along the western face to its northern extremity.

The general bearing of this line of croppings may be stated at N. 11° W., the distance twelve hundred and forty-three feet, and the angle of inclination upward from south to north, approximately, three degrees.

At the northern extremity of the hill this line of outcrop of quartzite, with its overlying limestone or dolomite, turns and extends along the northern slope with a downward inclination, thus gradually nearing the base of the hill until, at a distance of something over twenty-five hundred feet, it disappears beneath the bed of the creek.

The course of the outcrop along the northern slope of the hill is for a distance of nineteen hundred and fifty feet, N. 70° 30' E., and the angle of declination eight degrees, from west to east.

The "vein" consists of the underlying quartzite, impregnated with iron and silver in various forms, the width of





The plaintiffs owned the Silver Terra, some distance south and up the hill from the Sitting Bull. It does not appear upon what vein the Silver Terra location was based. It was not material for the purposes of the case that it should be shown. Both parties had lode patents for their respective claims. The Sitting Bull had, in following the vein southerly into the hill with its underground works, penetrated underneath the surface of the Silver Terra, whereupon the owners of that claim brought an action in equity to enjoin the owners of the Sitting Bull from trespassing within the boundaries of the Silver Terra.

The Sitting Bull justified its presence underneath the Silver Terra surface by asserting ownership of the apex of the vein, and its right to follow it between its end-line planes, to an indefinite depth.

The principal question involved was —

*"Is the top, or apex, of this vein, or lode, within the lines of the Sitting Bull location?"*

The court below, in arriving at its conclusions, considered the relative angles of declination in determining which was the top, or apex, of the vein. For the purpose of illustrating this, we present two figures (8 and 9). Figure

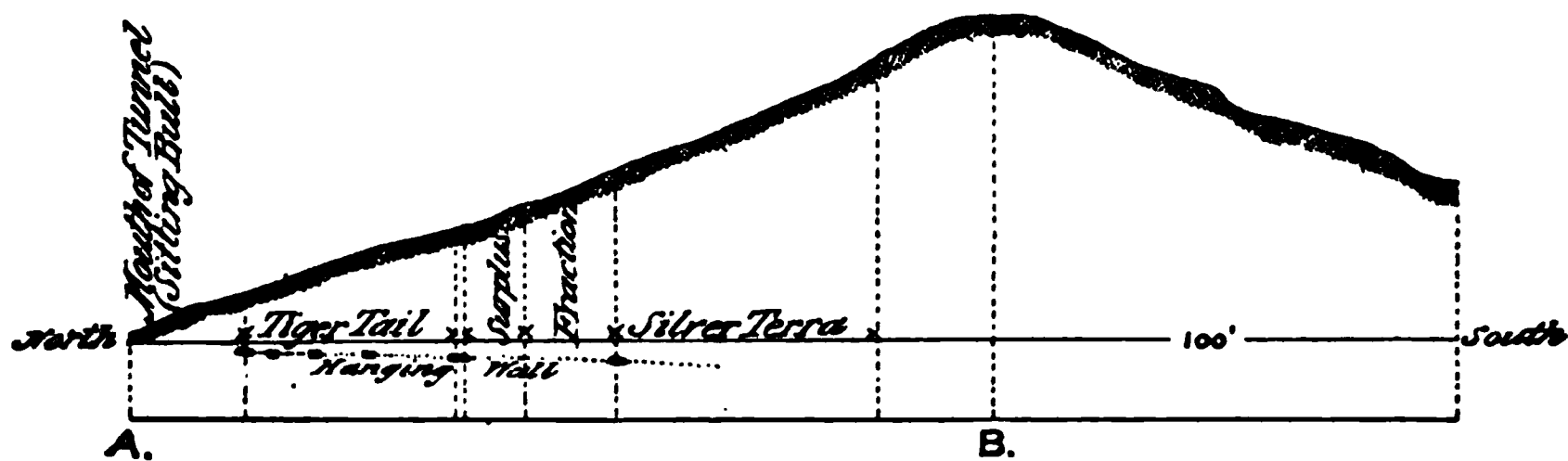


FIGURE 8.

8 is a longitudinal section taken through the line A B, shown on the horizontal projection (figure 7), parallel to the line of the outcrop exposed on the western slope of the hill. The angle of declination is found by the court to be, approximately, three degrees, from north to south.

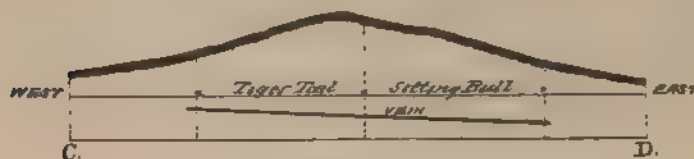


FIGURE 9.

Figure 9 represents a cross section taken through C D (on figure 7), at right angles to A B. The angle of this declination is found by the court to be eight degrees, from west to east, or five degrees greater than that shown in the section A B.

As to what constitutes the "top," or "apex," of a vein, the court expressed its views as follows:—

"The definition of the top, or apex, of a vein usually given is the end or edge of a vein nearest the surface; and to this definition the defendants insist we must adhere with absolute, literal, and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances, that is to be considered as the top, or apex, of the vein. The extent to which this view was carried by the defendants—and I must confess its logical results were exhibited by Professor Dickerman, their engineer, who, replying to an inquiry as to what would be the apex of a vein cropping out at an angle of one degree from the vertical, on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill, stated that, in his opinion, the whole line of that outcrop, from the bottom clear over the hill, so far as it extended, would be the apex of the vein. Some other witnesses had similar opinions. The definition given is no doubt correct, under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases, and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition.

"It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms top, or apex, but it seems, in fact, to have become somewhat clouded.

"Justice Goodard, a jurist of experience in mining law,

“in his charge to the jury in the case of *Iron S. M. Co. v. Louisville*, defines ‘top,’ or ‘apex,’ as the highest or terminal point of a vein, where it approaches nearest the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein.”

After quoting Judge Beatty’s definition given to the public land commission referred to in a preceding section, the court continues:—

“I am aware that in several adjudged cases ‘top,’ or ‘apex,’ and ‘outcrop’ have been treated as synonymous, but never, so far as I am aware, with reference to a case presenting the same features as the present. The word ‘apex’ ordinarily designates a point, and so considered the apex of a vein is the summit; the highest point in a vein is the ascent along the line of its dip, or downward course, and beyond which the vein extends no farther; so that it is the end, or, reversely, the beginning, of the vein. The word ‘top,’ while including ‘apex,’ may also include a succession of points—that is, a line,—so that by the top of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge.”

Applying these definitions to the facts of the case under consideration the court below held that the Sitting Bull location did not cover the top, or apex, of the vein. That the outcrop shown on the northern slope of Custer Hill was merely an exposure of the edge of the vein on the line of its dip, just as the exposure of the side edge of the ideal fissure vein represented on Figure 4.<sup>1</sup>

Judgment passed for the plaintiff. The supreme court of Dakota adopting the views of the trial court, affirmed the judgment. It was not in terms decided that the outcrop on the west slope of the hill was the top, or apex, of the vein. It was not necessary to do so in order to defeat the extralateral right claimed by the Sitting Bull. But if the owner of a location covering the outcrop on the western slope should pursue his vein easterly with his underground works so as to intersect the workings of the Sitting Bull, showing identity and continuity, and establish-

<sup>1</sup> See, *ante*, § 309.

ing that the angles of declination disclosed in such workings were the same as in the case proven, the conclusion is irresistible that the western outcrop would be the true apex of the vein, and this is in consonance with the rule applied to veins more or less vertical.

According to the views of Professor Dickerman, both lines of exposure shown on figure 4, would constitute an apex, or top. If such were the case, there would be no longer any difference between "strike" and "dip." The mathematical relationship which must necessarily exist between them would be destroyed, and any vein exposure on the side or bottom edge would be an "apex," and give extralateral rights. In other words, a locator covering the bottom edge of a vein, if it were exposed, could follow his vein on the upward course, and hold it as against a locator of the upper edge, or top. This is not a mere fanciful supposition.

An illustration of this occurred in Idaho in the case of *Gilpin v. Sierra Nevada Cons. M. Co.*, decided by the supreme court of that state.<sup>1</sup> It presents a case, so far as the facts were developed at the hearing, of a location on a flat vein similar to that shown in figure 10, where the location



FIGURE 10.

FIGURE 11.

was laid along what was claimed as an apex corresponding to the hypothetical exposure on the eastern slope of the hill covering the lower edge of the vein, that is, a location on

<sup>1</sup> 23 Pac. 547, 551.

the assumed line of exposure from *a* (figure 10) southerly along the eastern slope of the hill. The workings of the Sierra Nevada on the vein from this exposure into the hill showed an upward trend to the west in the direction of *b*. This was indicated by a number of physical facts. Among others, the flowage of water out of the mouth of defendant's tunnels, which had their openings on the exposure from *a* southerly, the tunnels having been run on the foot wall or floor of the vein. The defendant's works, following the vein on its upward trend, penetrated underneath the surface of plaintiff's claims. An injunction was sought and denied by the lower court. The supreme court of Idaho reversed the order and directed an injunction principally on the ground that the location of the Sierra Nevada did not cover the apex, and that the showing made did not justify or authorize its presence underneath the plaintiff's surface.<sup>1</sup>

Figures 10 and 11 represent veins having a top, bottom, and side edges exposed. It was formerly one vein, but erosion has made two of it. According to Professor Dickerman's theory, one locating the eastern exposure in figure 10 could follow up the hill along the vein, *a b*, provided, of course, that the western outcrop, *b*, has not been previously covered,—or, he might locate the exposures *a b* and *c d*,—and follow the vein into the mountain, whether its pitch was upward or downward.

Under the rule in the Duggan-Davey case, the exposures *c d* and *a b* might be apices if the vein dipped to the south at a greater angle of declination than shown on the northern face from *b* to *a*, and *c* to *d*. On the other hand, if the course into the hill was upward, the true apices would be found on the southern side. In that case, the exposures, *a b* and *c d*, would be the bottom instead of the top.

Professor Dickerman's theory, if applied, might be a convenient way of settling aggravating and expensive controversies by making the extralateral right depend entirely

<sup>1</sup> For dissenting opinion, see, 23 Pac. 1014.

on priority of appropriation, independent of the fact that the location is on the side edge of the vein, or on the bottom, instead of the top. But congress would have to remodel its laws, or the courts would have to change their construction of them before such a legal result is possible.

Of course, the difficulty comes from applying the terms of a law which was framed to meet ideal conditions—to peculiar occurrences in structural geology, not contemplated when the law was framed.

If a given deposit is of rock in place, it is a lode, or vein. If it is a lode, or vein, it has an apex, or top. While it may be difficult to determine where that top, or apex, is, yet, in the theory of the law it exists, and the lode locator must find it and lay his location along it, or take the chances of developing a valuable mine for some one else to take away from him, after openings have been made in the earth so that the surveyors may determine the relative angles of declination.

§ 311. **The Leadville cases.**—As in almost all other phases of the mining law, the flat deposits of Leadville have produced their full quota of adjudicated law on the subject of "tops" and "apices." As these deposits are legally held to be veins, or lodes, of rock in place, it follows that they must have apices. We have heretofore given an outline of the formation in which these deposits occur, and the manner of their occurrence.<sup>1</sup>

But in connection with the quotation of some of the definitions of the words "top," or "apex," as applied by the Colorado courts, we think it instructive to present in cross-section, illustrations showing the physical conditions surrounding some of the litigated cases, where these definitions have been announced and applied. A much better understanding of the views of the court in a given case is reached by the aid of diagrams.

<sup>1</sup>See, *ante*, § 300.



*Iron Silver Mining Co. v. Cheesman.*<sup>1</sup>—



FIGURE 12A.



**B.**  
FIGURE 12B.

Figures 12A and 12B are longitudinal sections on the line of the strike of the vein north and south, the latter section being along the joint Lime-Smuggler side line, along plane B B of figure 12B.

Figures 12A and 12B are cross-sections on the line of the dip, east and west, through the Lime incline, although in figure 12B the incline is not drawn.

Figures 12A and 12B are reduced, with slight modifications, from the atlas sheets of Mr. Emmons accompanying his monograph on "The Geology and Mining Industry of Leadville."<sup>2</sup>

Figures 12B and 12B are practically reproductions of

<sup>1</sup> 8 Fed. 207; 110 U. S. 529.

<sup>2</sup> Monograph XII. of the U. S. Geological Survey.

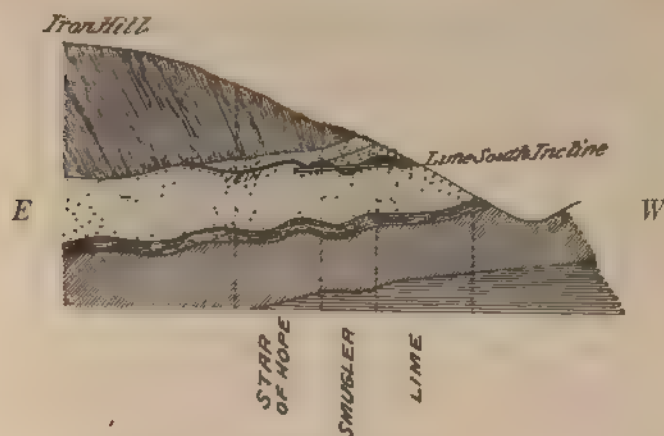


FIGURE 13 A.



FIGURE 13 B.

the sections prepared by Mr. C. M. Rolker, accompanying his "Notes on Leadville Ore Deposits," read before the American Institute of Mining Engineers.<sup>1</sup>

An inspection of figure 12A indicates that the only vein exposure is on the slope of the hill facing California Gulch. This exposure, and the one appearing on the opposite side in Dome Hill, having resulted from natural erosion. Bearing in mind the description given of the character of the vein and its inclosing rocks, given in a preceding section, the facts involved in the case were substantially as follows.—

<sup>1</sup>Trans. Am. Inst. Min. Eng., vol. xiv., p. 283.

The Iron Silver Mining Company owned by patent the Lime claim. Adjoining it on the east was the Smuggler, owned by the defendants. Prior to location, the defendants sunk a vertical shaft (see figure 12A) to the depth of forty feet, and at the bottom found a large body of mineral. After the discovery of the mineral in the Smuggler claim the owners of the Lime ran inclines (see figure 13A) from the Lime claim into and upon the Smuggler claim, and connected them with the Smuggler workings. Thereupon the Iron S. M. Co. commenced their action against defendants to eject them from the body of mineral they had discovered and developed within the Smuggler location, claiming that it was the lode or vein of mineral which had its apex within the Lime claim. This the Smuggler owners disputed, claiming that there was no vein or lode within the Lime ground; that whatever mineral was there was not in place, but had been removed to that point from some other locality.

The case was tried three times by jury.<sup>1</sup>

We have already noted the charge of Judge Hallett in this case, as to what constitutes a lode, or vein, which was the principal contention between the parties. Upon the subject of “apex,” we quote the following from Judge Hallett’s charge to the jury:—

“A good deal has been said by the witnesses as to  
“whether there is a top or apex of the vein. That de-  
“pends very much as to whether there is any vein, or lode,  
“there. If you find that there is a vein, or lode, to my  
“mind the evidence is clear enough that the top of it is in  
“the Lime location; and if there is none there, of course  
“that which does not exist, does not exist in any part—  
“it does not exist by its top nor by its bottom, nor any-  
“where between the two points.”<sup>2</sup>

<sup>1</sup>The first resulted in a verdict for the defendant. Plaintiff demanded a second trial as a matter of right, a practice permissible under the laws of Colorado. The second trial resulted in a disagreement; the third in a verdict and judgment for defendant, which was affirmed by the Supreme Court of the United States (116 U. S. 529).

<sup>2</sup>Iron S. M. Co. v. Cheesman, 8 Fed. 297, 302.

The jury found that there was no vein, or lode, which was the customary finding in all cases where the Iron Silver Mining Company attempted to assert extralateral rights. This was the unwritten law of Leadville. While the deposits were veins, or lodes, within the definitions given by the courts, they were not such, as a matter of fact, when the question was left to a jury of the neighborhood, if their verdict would uphold the right to pass on the dip of the vein through and beyond vertical planes, drawn through the side lines.<sup>1</sup> We cite the charge of Judge Hallett for the purpose of illustrating his views on the subject of "top," or "apex." This charge, as a whole, was approved by the supreme court of the United States.<sup>2</sup>

*Stevens & Leiter v. Williams.*<sup>3</sup>—

This case involved a controversy between the Iron and Grandview claims, situated upon Iron Hill, where the occurrence of the vein and vein exposure were similar to those found in the Lime-Smuggler case. The question of apex in the Iron-Grandview case received full consideration in two trials, at the first of which Judge Hallett presided, and at the second Justice Miller. Although the case was never passed upon by the supreme court of the United States, the charges to the two juries given by the presiding judges are considered to be a full exposition of the law on the subject. We are justified in quoting them fully. Judge Hallett's charge is as follows:—

"We have now to consider the question which was so much discussed by counsel as to the location with reference to the top and apex of a vein; and upon that point it is clear, from an examination of the act, that it was framed upon the hypothesis that all lodes and veins occupy a position more or less vertical in the earth—that is, that they stand upon their edge in the body of the mountain,—and these words 'top' and 'apex' refer to the part which comes nearest to the surface. The words used are

<sup>1</sup> For an interesting discussion of this, see Dr. Raymond's *Law of the Apex*

<sup>2</sup> 116 U. S. 529, 535.

<sup>3</sup> First trial, 1 Morr. Min. Rep. 557; second trial, *Id.* 566.

" 'top,' or 'apex,' as if the writer was somewhat doubtful  
" as to which word would best describe or best convey the  
" idea which he had in his mind. It was with reference  
" to that part of the lode which comes nearest to the sur-  
" face that this description was used: probably the words  
" were not before known in mining industry; at least, they  
" are not met with elsewhere, so far as I am informed. Per-  
" haps, they were not the best that could have been used  
" to describe the manner in which the lode should be taken  
" and located. But whether that be true or not, they are  
" in the act of congress, and there seems to be little doubt  
" as to their meaning; they are not at all ambiguous. In  
" some instances, they may perhaps refer to the *floc* of the  
" lode; that is, a part of the lode which has been detached  
" from the body of mineral in the crevice and flowed down  
" on the surface. In others, where there is no such outcrop,  
" they may mean that part which stands in the solid rock,  
" although below a considerable body of the superficial  
" mass, which I have attempted to describe to you. We  
" are all agreed, however, the courts and counsel, every one,  
" that that is the meaning of the words; that they are to be  
" taken in some such sense as that, as being the part of the  
" lode which comes nearest the surface; and the act requires  
" that the location shall be along the line of this top, or  
" apex. Supposing the lode to have a somewhat vertical  
" position in the earth, with this line of outcrop, or of ap-  
" pearance on the surface, or nearest to the surface, it shall  
" be taken up and occupied by the claimant as his location;  
" and he must find where this top, or apex, is and make  
" his location with reference to that."<sup>1</sup>

On the second trial, Justice Miller charged the jury,  
as follows:—

" I think that you will agree with me, as all counsel agree,  
" and all the witnesses agree substantially, conceding  
" that there is a vein, that the top, or the apex, of a vein,  
" within the meaning of the act of congress, is the highest  
" point of that vein where it approaches nearest to the sur-  
" face of the earth, and where it is broken on its edge so as  
" to appear to be the beginning or end of the vein. The  
" word 'outcrop' has been used in connection with it, and  
" in the true definition of the word 'outcrop,' as it concerns  
" a vein, is probably an essential part of the definition of  
" its apex, or top; but that does not mean the strict use of

<sup>1</sup> Stevens & Leiter v. Williams, 1 Morr. Min. Rep. 557, 551.

"the word 'outcrop.' That would not, perhaps, imply the presentation of the mineral to the naked eye on the surface of the earth; but it means that it comes so near to the surface of the earth that it is found easily by digging for it, or it is the point at which the vein is nearest to the surface of the earth; it means the nearest point at which it is found towards the surface of the earth. And where it ceases to continue in the direction of the surface, is the top, or apex, of that vein. It is said in this case that the point claimed to be the top, or apex, is not such, because at the points where plaintiff shows or attempts to prove an interruption of that vein in its ascent toward the surface, and what he calls the beginning of it, the defendants say that it is only a wave or roll in the general shoot of the metal, and that from that point it turns over and pursues its course downward as a part of the same vein in a westerly or southwesterly direction. It is proper, I should say to you, if the defendant's hypothesis be true, if at that point which the plaintiff calls the *highest point*, the *apex*, is merely a swell in the mineral matter, and that it turns over and goes on down in a declination to the west, that it is not a true apex within the statute. It does not mean merely the highest point in a continuous succession of rolls or waves in the elevation and depression of the mineral nearly horizontal."<sup>1</sup>

*Iron Silver Mining Company v. Murphy.*<sup>2</sup>—

This involved a controversy between the Iron and Loella claims. Judge Hallett charged the jury as follows:—

"The top, or apex, is the end, or edge, or terminal point of the lode nearest to the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location."

§ 312. Hypothetical illustrations, based upon the mode of occurrence of the Leadville and similar deposits. —It is not our purpose in this article to deal with the subject of extralateral rights or treat of the apex, as affecting

<sup>1</sup> *Stevens & Lester v. Williams*, 1 Morr. Min. Rep. 566, 574.

<sup>2</sup> 1 Morr. Min. Rep. 548.

those rights. We reserve this important element of the mining law for individual treatment in a later portion of this work. We are now interested in determining what is or is not a "top," or "apex." In the course of investigation, however, reference to the extralateral right is incidentally involved, to the end that the conclusions reached may be rationally explained and applied to cases within reasonable probabilities.

We have heretofore considered two classes of deposits: those whose position in the earth approximates the perpendicular, and those approaching the horizontal. The geological conditions at Leadville suggest additional complications, by reason of the fact that the veins do not always occupy the same plane, but are frequently found in alternating anticlinal and synclinal folds, which are best expressed by the use of the term "undulating."

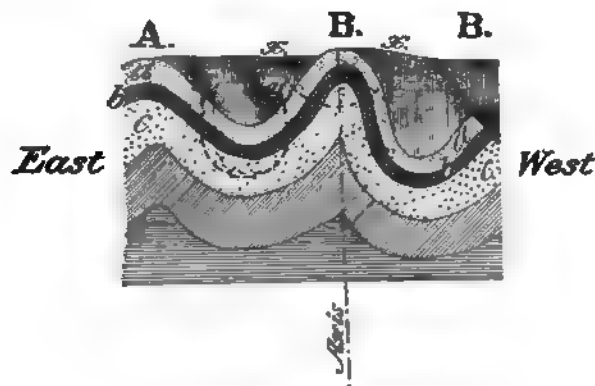


FIGURE 14.

For purposes of illustration, we present in figure 14 a cross-section. In the figure the stratum *d d* represents the overlying white porphyry; *b b*, the vein material; *c c*, the underlying blue limestone. The lines *A x* and *B B* represent the crests of the ridges formed by the anticlinal folds at right angles to the axes.



If the overlying porphyry were removed, leaving the vein material exposed throughout, it would not be a vein of rock in place, legally speaking, but a mere bed. Neither A x nor B B would be apices. They are tops or crests of the folds, but not apices of the deposit. The whole exposed surface would be the top of the deposit, contradistinguished from the bottom lying on the limestone. The same result would follow if the deposit, instead of being exposed at the surface, was covered with detritus or "slide." The deposit, legally speaking, would not be in place in the mass of the mountain. There are no analogies between this instance and that of an outcrop of the upper edge of a vein emerging from the inclosing rocks. Such an uncovered deposit as we have described could only be located under the laws applicable to placer claims. A locator would acquire only so much of the deposit as might be found within vertical planes drawn through his surface boundaries.

With the vein in position, as shown in figure 14, it might be said that its highest part, or the part approaching nearest to the surface (assuming that there was no surface exposure elsewhere), would be along the crest of the fold. But this would not be the top, or apex, of the vein. It would be the top, or apex of a fold in the vein. If this line were the apex of the vein, a location with side lines along the crest would give the locator the right to follow the vein in both directions, east and west, "up hill" and "down dale," indefinitely, so far as the vein preserved its continuity and identity.

The only exposures of the vein in position as shown in Figure 14 that can possibly answer to the definitions given by the courts are those indicated by the abrupt terminations at the east and west. As to which of these two exposures would be considered the true apex, is a difficult question, and might have to be determined mathematically, by ascertaining which occupied the higher elevation above a given datum plane.

Eliminating from consideration the inquiry as to which of the two exposures is the higher above a given datum plane, a location on the east or west would cover an apex; and if it covers an apex, the right of extralateral pursuit would inure to the locator, to the extent that the identity and continuity of the vein could be established up and down the undulations or folds.

If we can assume that the crest of the anticlinal fold has been eroded, as represented by the dotted line *x x*, we would have then two distinct veins, with their attributes of apices, strike, and dip. But suppose the erosion occurred in the synclinal fold, as illustrated by the dotted line *y y*, leaving two exposures,—would these be apices? They would not be, according to the rule announced in the case of *Gilpin v. Sierra Nevada Consolidated*, heretofore referred to, unless, as suggested by Judge J. H. Beatty in that case, the course upward proved, on subsequent development, to be caused by a mere local fold or dislocation.<sup>1</sup>

It is hardly profitable to pursue this discussion further. Enough has been said to show the absurdity of the law, when applied to geological conditions which were not in contemplation of the law-makers when the laws were enacted. But it is, nevertheless, the law, if these deposits are “veins, or lodes of rock in place,” and the courts hold that they are.

Geologists have always insisted that this character of deposits should be separately classified. There is no reason why the law-makers should not so classify them, or else abandon the entire element of lateral pursuit, and limit the locator to vertical planes drawn through surface boundaries. In considering the difficulties surrounding the application of the law to conditions similar to those existing at Leadville, we recall the almost prophetic language of Judge W. H. Beatty, then chief justice of Nevada:—

“We are willing to admit that cases may arise to which it will be difficult to apply the law; but this only proves

<sup>1</sup> See, *ante*, § 310.

"that such cases escaped the foresight of congress, or that, although they foresaw the possibility of such cases occurring, they considered that possibility so remote as not to afford a reason for departing from the simplicity of the plan they chose to adopt"<sup>1</sup>

§ 313. **The existence and situs of the "top," or "apex," a question of fact.** - When we consider that most, if not all, of the definitions of "top," or "apex," found in this article are contained in charges to juries, it is hardly necessary to cite authorities to show that the existence and *situs* of the "top," or "apex," are questions of fact. What constitutes an apex, is a question of law to be determined by the court; but whether a given portion of a lode, or vein, is its "top," or "apex," and what is its course through the ground of contending parties, is a question for the jury.\*

This accounts for the presence in the literature of the law of so many able and logical statements as to what constitutes a "top," or "apex," and the absence of recorded cases, establishing the existence of any such tops, or apices, within the Leadville belt. It would seem that among the muniments of a lode locator's title in this section is the unwritten law of the neighborhood, that no extralateral rights should be permitted.

#### ARTICLE V. "STRIKE," "DIP" OR "DOWNWARD COURSE."

§ 317. Terms "strike" and "dip" not found in the Revised Statutes - Popular use of the terms.

§ 318. "Strike" and "dip" as judicially defined.

§ 317. **Terms "strike" and "dip" not found in the Revised Statutes - Popular use of the terms.**—The act of July 26, 1866, granted the right to follow the located vein, "with its dips, angles, and variations, to any depth."

<sup>1</sup> Gleason v. Martin White M. Co., 13 Nev. 442.

<sup>2</sup> Illinois S. M. Co. v. Raff (New Mex.), 34 Pac. 544; Blue Bird M. Co. v. Largey, 40 Fed. 289. See, also, cases cited in *ante*, § 311.

The Revised Statutes, in defining the extralateral right, use the terms "entire depth," and "course downward," as a substitute for the terms "dips, angles, and variations." The term "dip" is the one in common use. "Dip" and "depth" are of the same origin, and "dip" and "course downward" are synonymous. "Dip" is the direction or inclination towards the "depth."<sup>1</sup>

"Strike" does not appear in any of the mining laws. It is the popular term for designating the longitudinal course of a vein such as is indicated by following the apex of a lode of the character shown in figure 4,<sup>2</sup> that is the "length along the vein," as these terms are used in section twenty-three hundred and twenty of the Revised Statutes, which is equivalent to the longitudinal course. The terms "dip" and "strike" have such a mathematical relationship to each other that it is almost impossible to define one without including the definition of the other.

§ 318. "**Strike**" and "**dip**" as judicially defined.— Judge W. H. Beatty, in his testimony before the public land commission, thus defined these terms:—

"The strike, or course, of a vein is determined by a horizontal line drawn between its extremities at that depth at which it attains its greatest longitudinal extent. The dip of a vein, its "course downward" (Rev. Stats., § 2322), is at right angles to its strike; or, in other words, if a vein is cut by a vertical plane at right angles to its course, the line of section will be the line of its dip. . . .

"The strike, or course, of a vein can never be exactly determined until it has been explored to its greatest extent; but a comparatively slight development near the surface will generally show its course with sufficient accuracy for the purposes of a location. The dip having an exact mathematical relation to the course of the vein is, of course, undetermined until the strike is determined; but, practically, the line of dip is closely approximated by taking the steepest the (nearest a vertical) line by which a vein can be followed downward."<sup>3</sup>

<sup>1</sup> Duggan v. Davey, 4 Dak. 110, 141.

<sup>2</sup> See, *ante*, § 309.

<sup>3</sup> Report of Public Land Commission, p. 399.

The miner in locating his claim, although he is called upon to locate it "along the vein," has but little opportunity to explore the ground and determine prior to location what is its course, or strike. He is compelled to exercise his best judgment from surface indications and such primitive development as the limited time allowed him to perfect his location will permit. A vein does not always outcrop to any considerable distance, so as to present to the miner's observation its longitudinal direction. His location usually precedes any extended exploration, and, in most cases, is made without accurate knowledge of the course or direction of the vein.<sup>1</sup>

Mathematically speaking, the true course of a vein is never demonstrated until after extensive investigation and the expenditure of time and money. In a case decided by Judge Hawley, sitting as circuit judge in the ninth circuit,<sup>2</sup> one of the veins in controversy had been located for forty years, and at different times during that period the mine was in active operation. At the trial, the course of this vein was a disputed and closely contested question, although there were extensive underground workings.

In addition to this, the lower levels of a mine frequently show a different direction from that which guided the miner in making his location, and are at variance with conditions shown in openings nearest to the surface. This was the case in the famous Flagstaff mine in Utah,<sup>3</sup> where the croppings showed that the direction, or course, of the apex of the vein at or near the surface, was nearly east and west. By following a level beneath the surface, the strike of the vein ran in a northwesterly direction, so that if, by a process of abrasion, the mountain were ground down, the strike of the vein would have been northwest instead of west, as the line connecting the surface outcrops tended to show that it was.

<sup>1</sup> *Iron S. M. Co. v. Elgin M. Co.*, 118 U. S. 196, 204.

<sup>2</sup> *Cons. Wyoming G. M. Co. v. Champion M. Co.*, 63 Fed. 540, 548.

<sup>3</sup> *Flagstaff S. M. Co. v. Tarbet*, 98 U. S. 463, 469.

Upon this state of facts, the supreme court of the United States thus expressed its views:—

"We do not mean to say that a vein must necessarily crop out upon the surface in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position of the vein, and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. . . . Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined."

An interesting and important case involving this question is that of the Carson City Gold and Silver Mining Company v. North Star Mining Company, tried before Judge James H. Beatty, United States district judge of Idaho, sitting as circuit judge. Figure 15 represents the properties in controversy and the underground workings of the North Star mine in horizontal projection.

The line C D traversing the center of the North Star surface was the line connecting the collar of the main working shaft, the mouth of the Larimer incline, the East Star shaft, all sunk on the vein, and a shallow vertical shaft at D. The course of the vein to the west was interrupted at the point C by the occurrence of a "crossing," or a zone of fractured country rock, into which the vein, as far as developed, was not shown to have penetrated. The vein was located in 1851, and had been worked by the North Star Company and its predecessors, with casual interruptions, ever since. The plaintiff in the case, owning the Irish-American ground, contended that the true course of the vein was southeasterly from the point C and across the





FIGURE 15.

side line 12, presenting a case, according to its contention, wherein the North Star Company was denied any extralateral right. The course of many of the deeper levels appeared to sustain its contention as to the longitudinal direction of the vein. The court, however, declined to accept the underground workings as determining the true course of the apex, announcing its views as follows —

“The workings of a mine made in mining operations,  
“and not in support of litigation, are generally important  
“as evidence of any facts which may be legitimately in-  
“ferred from them. The three incline working shafts were  
“started upon this North Star central line, and are all  
“shown to follow the ledge on their descent. It is reason-  
“able to presume that they were started upon or near the



"apex of the ledge. . . . As ledges may in their depths  
"change their course, and as the surface course, or the  
"course of the apex, is to govern the miner's rights, the  
"workings nearest the surface are better guides to the course  
"of the apex than those far below."<sup>1</sup>

The "strike" of the vein, for the purpose of guiding the miners in making their location, is, therefore, not the "technical true strike of the engineer, the line which  
"would be cut by a horizontal plane. Such a requirement  
"would be in many cases impracticable."<sup>2</sup>

The true method of determination is found in the rule laid down by the supreme court of the United States in the Flagstaff case, and followed by Judge Beatty in the North Star case, that the workings nearest the surface are better guides to the course of the apex than those far below.

The "strike" once determined, the ascertainment of the direction of the "dip" follows as a mathematical deduction. The true average dip of a vein is always at right angles to the strike.<sup>3</sup>

If the strike is north and south, the dip is either to the east or west. The angle of declination is ascertained by a line drawn in the plane of the vein from the top, or apex, to the lowest workings, at right angles to the strike, and the "dip" may be of any degree between the vertical and horizontal.

Of course, a vein in its course downward does not always maintain a uniform dip,—“faults,” “folds,” “horses,” and local dislocations occur on the “dip,” as well as on the “strike,” which do not affect the legal identity or continuity of the vein. But these are matters of minor importance, not affecting the rule for determining “strike,” or “dip,” of the average vein.

In veins that descend into the earth at slight angles of declination, it is of course difficult, if not impossible, at

<sup>1</sup> Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 601.

<sup>2</sup> Duggan v. Davey, 4 Dak. 110, 143.

<sup>3</sup> Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662.

times to determine which is "strike" or which is "dip." This is fully shown in the case of *Duggan v. Davey*, commented upon and illustrated in a preceding section,<sup>1</sup> and suggested in discussing the form of the Leadville deposits. Necessarily, each case must depend for solution upon the particular facts surrounding it. For all practical purposes, the definitions given in this article, and the authorities cited, are sufficient.

<sup>1</sup>See, *ante*, § 310.

## CHAPTER II.

### LODE CLAIMS, OR DEPOSITS "IN PLACE."

#### ARTICLE I. INTRODUCTORY.

- II. THE LOCATION AND ITS REQUIREMENTS.
- III. THE DISCOVERY.
- IV. THE DISCOVERY SHAFT AND ITS EQUIVALENT.
- V. THE PRELIMINARY NOTICE AND ITS POSTING.
- VI. THE SURFACE COVERED BY THE LOCATION—ITS FORM AND RELATIONSHIP TO THE LOCATED LODE.
- VII. THE MARKING OF THE LOCATION ON THE SURFACE.
- VIII. THE LOCATION CERTIFICATE AND ITS CONTENTS.
- IX. THE RECORD.
- X. CHANGE OF BOUNDARIES AND AMENDED LOCATION CERTIFICATES.
- XI. RELOCATION OF FORFEITED OR ABANDONED CLAIMS.
- XII. LODES WITHIN PLACERS.

#### ARTICLE I. INTRODUCTORY.

- |   |  |
|---|--|
| § 322. Introductory.                                      | occurring in veins as affecting the                        |
| § 323. The metallic or non-metallic character of deposits | right of appropriation under the laws applicable to lodes. |

§ 322. **Introductory.**—In the preceding chapters of this work, it has been demonstrated that only the public mineral lands of the United States may be appropriated under the mining laws.<sup>1</sup> By "public lands" is meant such as are subject to sale or disposal under general laws. Land to which any claims or rights of others have attached does not fall within the designation of "public land."<sup>2</sup>

<sup>1</sup> See, *ante*, § 112.

<sup>2</sup> *Newhall v. Sanger*, 92 U. S. 761; *Bardon v. N. P. R. R.*, 145 U. S. 535; *Mann v. Tacoma Land Co.*, 153 U. S. 273; *Wilcox v. Jackson*, 38 U. S. 498; *Cameron v. United States*, 148 U. S. 301; *United States v. Tygh Valley Land & L. S. Co.*, 76 Fed. 693.

We have also attempted to illustrate<sup>1</sup> the nature and character of the appropriation under laws (other than those exclusively applicable to the acquisition of mineral lands) which operate as a segregation of a given tract from the body of public land, and inhibit its acquisition, although mineral in character, under the mining laws. What constitutes such an appropriation of mineral lands, under these last-named laws, as will remove them from the category of "public lands," and inhibit their acquisition by other mining claimants, can be determined only after an analysis of the law regulating the acquisition of title to such lands. After we shall have outlined the methods provided by law for such acquisition, we shall endeavor to explain fully the nature and extent of the title so acquired, the tenure by which it is held, the property rights flowing therefrom, and the conditions under which such rights may be lost or extinguished. The general statement may here be properly made, however, that a perfected, valid appropriation of public mineral lands, under the mining laws, operates as a withdrawal of the tract from the body of the public domain, and so long as such appropriation remains valid and subsisting the land covered thereby is deemed private property.<sup>2</sup>

We are now to consider the manner in which public mineral lands containing veins, or lodes, of quartz or other rock in place may be lawfully appropriated.

**§ 323. The metallic or non-metallic character of deposits occurring in veins of rock in place as affecting the right of appropriation under the laws applicable to lodes.**—In defining what constitutes "mineral land" within the meaning of the acts of congress, using that term

<sup>1</sup> See, *ante*, title III, ch. III., §§ 112-219.

<sup>2</sup> *Gwillim v. Donnellan*, 115 U. S. 45; *Belk v. Meagher*, 104 U. S. 279; *S. C.*, 3 Mont. 65; *McFeters v. Pierson*, 15 Colo. 201; *Iron S. M. Co. v. Campbell*, 17 Colo. 267; *Seymour v. Fisher*, 16 Colo. 188; *Garthe v. Hart*, 73 Cal. 541; *Souter v. Maguire*, 78 Cal. 543; *Armstrong v. Lower*, 6 Colo. 393; *Lebanon M. Co. v. Cons. Rep. M. Co.*, 6 Colo. 371; *Faxon v. Barnard*, 4 Fed. 702.

as the legal equivalent of the various words and phrases of a kindred nature found in the mining laws,<sup>1</sup> we have heretofore treated the subject regardless of the form in which the deposits occur—*i. e.* whether “of rock in place,” as in quartz veins, or not “in place,” as in the case of auriferous gravels and other substances encountered in surface beds.<sup>2</sup> The conclusions there reached<sup>3</sup> were intended to apply to all classes of deposits, without any attempt at classification as to form of occurrence. We are now called upon to consider a special class of mineral lands, and to determine to what extent, if any, the metallic or non-metallic character of the deposits found in veins of rock in place controls the manner in which lands containing them may be appropriated.

The act of July 26, 1866, provided for the acquisition of title to veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, or copper. By necessary intendment it excluded all other classes of metallic substances, as well as all which were non-metalliferous. The placer law of July 9, 1870, extended the right of entry and patent “to claims usually called ‘placers,’ including all forms “of deposit, excepting veins of quartz or other rock in place.”

The act of May 10, 1872, provided in terms for the appropriation of lands containing veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, *lead, tin, copper, or other valuable deposits.*

This is preserved in the Revised Statutes, which also contain the provisions of the placer law of 1870, heretofore referred to. Therefore, under the existing law we find the classification to be as follows:—

(1) Lands containing veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other *valuable deposits*;<sup>4</sup>

(2) Claims, usually called “placers,” including all forms of deposit, excepting veins of quartz or other rock in place.<sup>5</sup>

<sup>1</sup> See, *ante*, § 86, p. 93.

<sup>2</sup> See, *ante*, § 95, p. 112.

<sup>3</sup> See, *ante*, § 98.

<sup>4</sup> Rev. Stats. § 2320.

<sup>5</sup> Rev. Stats. § 2329.

And in prescribing the method for obtaining patents, both classes seem to have been grouped under the term "valuable deposits."<sup>1</sup>

It may be said that, ordinarily, nothing but metalliferous ores are encountered in veins of rock in place. There are, however, exceptions to this rule. Coal occurs in veins, and in many instances with as pronounced dip and strike as in the auriferous quartz lodes. But lands containing coal are sold under special laws. Marble, borax, onyx, gypsum, talc, graphite, rock phosphates, chalk, marls, oil-stones, mica, asbestos, fluorspar, sulphur, and mineral paint are non-metallic substances, and occur in veins of rock in place. All of these have commercial value, and in many instances yield as much profit in proportion to the cost of exploitation and extraction as the metalliferous veins. When any of these substances occur in the form of superficial deposits, lands containing them may be appropriated under the placer laws, as they are not veins of rock in place. But suppose they occupy a pronounced inclined position in the mass of the mountain — how are they to be appropriated? If by the placer laws, and if they are on surveyed lands, they must be taken up in some subdivision of the government surveys, and according to the current of land department authority, there must be a discovery on each twenty acres. If the deposit should exist in the form of an ideal vein, there would be but one exposure upon which a discovery could be based, and nothing overlying the dip beyond the vertical plane drawn through the surface boundary of a twenty-acre tract could be located, because discovery would be impossible except by sinking vertical shafts at great expense, with no protection in the meanwhile, in the possession of the tract. We cannot see, since the act of 1872 was passed increasing the number of terms used in the prior law, what right the land department has to insist that veins, or lodes, must be metalliferous in order to be appropriated under the lode laws. The extralateral right may be of as

<sup>1</sup> Rev. Stats. § 2325.

much value to the proprietor of a mica, rock phosphate, or talc vein, as a gold vein. The act itself, in terms, makes no distinction based upon the chemical composition of the deposit. But it groups the classes according to the *form* in which the valuable deposits occur. In our judgment, the land department is no more authorized to insist that veins, or lodes, of mica or graphite in place should be located as placers, than it has to require cinnabar deposits to be located as lodes, independently of the form of their occurrence.<sup>1</sup>

How shall they be appropriated?

The term "deposits" used in section twenty-three hundred and twenty of the Revised Statutes is just as comprehensive as the same term found in section twenty-three hundred and twenty-nine.

The deliberate addition in the statute of the term "valuable deposits" to the enumeration of metallic substances, is of itself evidence of the highest character that the intention of the law-makers was to enlarge the scope of the lode laws, and embrace every character of deposit found in veins of rock in place which fall within the meaning of "mineral" in its broadest sense. If the meaning of the term "valuable deposits" was intended to be restricted to such substances as were metallic in their nature, it is fair to presume that congress would have used the term "valuable metallic or metalliferous deposits." Gold occurs in veins of rock in place, and when so found the land containing it must be appropriated under the laws applicable to lodes. It is also found in placers, and when so found the land containing it must be appropriated under the laws applicable to placers. Iron ore is found in veins of rock in place. It also occurs in beds and superficial deposits. Where it is found in veins, lands containing it must be appropriated under the lode laws. Where it is not found in veins of rock in place, the proceedings to obtain government title are the same as those prescribed for placers.<sup>2</sup>

<sup>1</sup> Copp's Min. Dec. 47, 60.

<sup>2</sup> *In re Stewart*, 1 Copp's L. O. 34; Com'rs' Letter, Copp's Min. Dec. 235.



Iron is not named in the act of 1872, nor in the Revised Statutes. Prior to the passage of that act, lands containing it were sold the same as agricultural lands. That act, as interpreted by the land department, was comprehensive enough to include iron ore, and thenceforward lands containing such substances were patented only under the mining laws.<sup>1</sup>

The large number of non-metallic substances mentioned in a previous chapter of this work<sup>2</sup> have been held by the land department to fall within the definition of "mineral" and "deposit," as these terms are used in the mining statutes. True, in the cases wherein this rule was established the substances occurred in the form of superficial deposits. But if it is once determined that they are "mineral" or "valuable deposits," they then become subject to classification for the purpose of appropriation, the same as the metallic substances enumerated in the act.

We are not unmindful of the decision of the supreme court of Washington,<sup>3</sup> wherein that court announced that, in its judgment, a mining claim, whether lode or placer, is not established or entitled to be patented under the mineral laws, unless it contains some of the *metals* for which mining works are prosecuted; nor do we overlook the recent ruling of Secretary Hoke Smith, arising out of the same case, wherein the supreme court of Washington is criticised by the distinguished secretary for invading his jurisdiction; but the conclusions reached by the secretary go further than did the offending state court. The secretary says:

"It appears to me so plain that congress only contemplated lands that were valuable for the *more precious metals* should be patented as lode claims, that it needs no "argument to convince one of the proposition."<sup>4</sup>

<sup>1</sup> Com'rs' Letter, Copp's Min. Dec. 214.

<sup>2</sup> See, *ante*, § 97.

<sup>3</sup> Wheeler v. Smith, 5 Wash. 704.

<sup>4</sup> Wheeler v. Smith, 23 L. D. 395, 399.

Commissioner McFarland also made a ruling that veins of clay or non-metalliferous substances were not subject to location as lodes, but might be entered as placers.<sup>1</sup>

It is unnecessary for us to here reiterate the conclusions heretofore reached by us<sup>2</sup> as to what is meant by the terms "mineral land" and "valuable deposits," as these terms are used in the mining laws. We think those conclusions were based upon the weight of authority. If they are correct, it follows, in our judgment, that land containing any substance, metallic or non-metallic, which possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, if such substance exists therein in veins, or lodes, *of rock in place* in sufficient quantities as to render the land more valuable for the purpose of removing and marketing the product than for any other purpose, such land must be appropriated under the laws applicable to lodes.

This may be contrary to the popular notion. But if there is any logic in the law, it seems to us that there is but one conclusion to be deduced, and that is the one we have adopted.

Perhaps instances of non-metallic substances occurring in veins of rock in place are rare, and the solution of the question not of great public importance. But it is a matter of public importance that the mining laws should be consistently construed, and that arbitrary interpretation should be avoided.

We are of the opinion that the metallic or non-metallic character of the contents of veins, or lodes, of rock in place is entirely immaterial, if they otherwise fulfill the requirements announced in section ninety-eight of this treatise.

<sup>1</sup> *Montague v. Dobbs*, 9 Copp's L. O. 165.

<sup>2</sup> See, *ante*, § 98.

## ARTICLE II. THE LOCATION AND ITS REQUIREMENTS.

- |  |   |
|--|---|
| § 327. "Location" and "mining claim" defined.<br>§ 328. Acts necessary to be performed to constitute a valid lode location under the Revised Statutes in the absence of supplemental state legislation and local district rules. | § 329. The requisites of a valid lode location where supplemental state legislation exists.<br>§ 330. Order in which acts are performed immaterial.<br>§ 331. Locations made by agents. |
|--|---|

§ 327. "Location" and "mining claim" defined.— "Location" and "mining claim" do not always mean the same thing. The supreme court of the United States has said that a mining claim is a parcel of land containing precious metal in its soil or rock.<sup>1</sup> A location is the act of appropriating such parcel according to certain established rules. The "location" in time became among the miners synonymous with the "mining claim" originally appropriated. If the miner has only the ground covered by one location, his "mining claim" and his "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires other adjoining "locations," and adds them to his own, then his "mining claim" covers the ground embraced by all the locations.<sup>2</sup>

Judge Hillyer defined a "mining claim" to be that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with the mining law.<sup>3</sup> The words "mining claim" have no reference to the different stages in the acquisition of the government title. It includes all mines, whether patented or not patented, if acquired under the mining laws.<sup>4</sup>

"Location" is the inception of the miner's title.

<sup>1</sup>The use of the term "precious metal" in this connection is manifestly of no controlling importance. The Revised Statutes enumerate a number of metals which are in no sense "precious."

<sup>2</sup>*St. Louis Smelting Co. v. Kemp*, 104 U. S. 636; *McPeters v. Pierson*, 15 Colo. 201. See, also, *N. P. R. R. Co. v. Sanders*, 49 Fed. 129, 135; *In re Mackie*, 5 L. D. 190.

<sup>3</sup>*Mt. Diablo M. & M. Co. v. Callison*, 5 Saw. 439.

<sup>4</sup>*Bewick v. Muir*, 83 Cal. 368, 372.

A statute of California provides that "every person who performs labor upon any 'mining claim' has a lien upon the same."<sup>1</sup> In construing this law, the supreme court of that state has held that the lien extends to the *whole claim*,<sup>2</sup> but by such a "claim" was meant, a portion of the public lands to which the right of enjoyment has been asserted under the mining laws; that a Mexican grant containing eleven hundred and nine acres, and another three hundred and fourteen acres, upon which mining was conducted, the whole being known as the Guadalupe mine, was not a "mining claim," and no lien could be filed thereon.<sup>3</sup> Nor is a tract of one hundred and sixty acres of land, held under agricultural patent, upon which parties were engaged in mining, such a "claim" as is lienable.<sup>4</sup> But a consolidation of numerous *mining locations*, held and operated under one ownership, the aggregation being designated by a general name, such as the "Red Cloud mine," is a "mining claim," and the whole *claim* is lienable.<sup>5</sup>

While the law prescribes a limitation as to the size of a *location*, there is no limitation to the number of *claims* one person may hold by purchase.<sup>6</sup> A single location is a "claim," as that term is used in the Revised Statutes. But, as we have heretofore seen, "claim" may embrace a number of locations.

**§ 328. Acts necessary to be performed to constitute a valid lode location, under the Revised Statutes, in the absence of supplemental state legislation and local district rules.**—It is not necessary that any supplemental state legislation or local district regulations should exist. Where they do not exist, a location may be perfected by

<sup>1</sup> Cal. Code Civ. Proc., § 1183.

<sup>2</sup> Helm v. Chapman, 66 Cal. 291.

<sup>3</sup> Williams v. Santa Clara Min. Ass'n., 66 Cal. 193; U. S. Min. Dec. 136, 142; Week's Min. Lands, 118.

<sup>4</sup> Morse v. De Ardo, 107 Cal. 622.

<sup>5</sup> Tredennick v. Red Cloud M. Co., 72 Cal. 78, 84. See, also, Malone v. Big Flat G. M. Co., 76 Cal. 583.

<sup>6</sup> St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 648; Malone v. Big Flat G. M. Co., 76 Cal. 578, 583.

following the requirements of the federal law. The acts to be performed in the absence of state or district regulations are few and simple. The requisites of such location are —

- (1) The discovery;
- (2) The marking of the location on the ground so that its boundaries can be readily traced.

No notice need be posted<sup>1</sup> nor recorded;<sup>2</sup> no particular kind of marking is required so long as the "boundaries may be readily traced." The taking and holding of actual possession is wholly unnecessary, and this applies to all classes of locations, wherever made, and whether state legislation, or local rules, exist or not. Actual possession is no more necessary for the protection of title acquired by a valid mining location than it is for any other grant from the United States.<sup>3</sup> Such a discovery having been made as will satisfy the law,<sup>4</sup> the marking of the location on the ground including the place of his discovery completes the location and clothes the locator with the complete possessory title. No development or discovery work is required. In fact, no labor need be performed nor improvements made until within the year commencing on the first day of January succeeding the date of the location.<sup>5</sup>

§ 329. The requisites of a valid lode location under the Revised Statutes where supplemental state legislation exists. Most of the precious metal-bearing states have availed themselves of the privilege of supplementing federal legislation, and have adopted systems more or less comprehensive. We have heretofore given an outline of the general scope and character of this legislation,<sup>6</sup> from which it will be readily observed that in some of the states certain requirements exist which are not found in others. A location made with all the formalities required by the

<sup>1</sup> See, *post*, art. v.

<sup>2</sup> See, *post*, art. ix.

<sup>3</sup> *Belk v. Meagher*, 104 U. S. 279, 283.

<sup>4</sup> See, *post*, § 335.

<sup>5</sup> Amend. to § 2314 Rev. Stats. Jan. 22, 1880, 21 Stats. at Large, 61.

<sup>6</sup> See, *ante*, §§ 248-252.

federal statute only, might be valid in California, but would not be in Colorado. As state laws form an important element of the federal system in their respective jurisdictions, it is necessary to a satisfactory presentation of the subject under consideration to give them their proper place, distributed under the several appropriate heads. We think the object may be intelligently accomplished by selecting as a type of such state legislation the local code which is the most comprehensive, and note the differences between that code and the existing laws of other states and territories. In this way we shall be enabled to present, under appropriate subdivisions approaching methodical arrangement, the rule in each state or territory touching the subject immediately under consideration, in connection with the treatment of the requirements of the congressional laws. For this purpose we select the state of Colorado, and will divide our subject, for purpose of treatment, on the basis of the Colorado mining laws, noting wherein the requirements of other states are similar, or are different.

Under the laws of Colorado the following acts are required to complete a valid lode location:—

- (1) The discovery;
- (2) The sinking of a discovery shaft of certain prescribed dimensions, or its equivalent;
- (3) The posting of a notice;
- (4) The marking of surface boundaries in a certain specified manner;
- (5) The making of a location certificate;
- (6) The recording of such certificate.<sup>1</sup>

A substantial compliance with the requirements of the laws, federal and state, as well as local rules, where they exist and are not repugnant to state or federal legislation, is a condition precedent to the completion of a valid location.<sup>2</sup>

<sup>1</sup> *Strepey v. Stark*, 7 Colo. 614.

<sup>2</sup> *Upton v. Larkin*, 5 Mont. 600; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53; *Strepey v. Stark*, 7 Colo. 614; *McKinstry v. Clark*, 4 Mont. 370, 395; *Noyes v. Black*, 4 Mont. 527; *Gleeson v. Martin White M. Co.*, 13 Nev. 443; *Sweet v. Webber*, 7 Colo. 443; *Lalande v. McDonald*, 2 Idaho, 283.

Mere possession without complying with the law confers no rights.<sup>1</sup>

In the nature of things, we cannot deal with local district regulations in detail. We have heretofore outlined our views as to their legitimate scope and the extent to which they may be operative.<sup>2</sup> Where they exist and are in harmony with state and federal legislation they are to be considered and construed in the light of the general principles, which will be enunciated in reference to state legislation in the succeeding articles.

§ 330. Order in which acts are performed immaterial—Time when non-essential.—The order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights.<sup>3</sup>

The failure to perform any of the given acts within the time limited by the laws or local rules may subject the ground to relocation; but if the requirements are complied with prior to the acquisition of any intervening rights, no one has a right to complain. Of course, the locator delays at his peril; but if the appropriation becomes complete before any one else initiates a right, the antecedent delay is condoned, and the right becomes perfected.<sup>4</sup> But unless completed the attempted location is of no avail as against intervening rights,<sup>5</sup> assuming, of course, that the subsequent entry for the purpose of location is peaceable and in good faith.<sup>6</sup>

<sup>1</sup> See, *ante*, §§ 216-219; *Horswell v. Ruiz*, 67 Cal. 111; *Morenhaut v. Wilson*, 52 Cal. 263; *Chapman v. Toy Long*, 4 Saw. 28; *Belk v. Meagher*, 104 U. S. 279, 284; *Jordan v. Duke*, 36 Pac. 896.

<sup>2</sup> See, *ante*, §§ 268-275.

<sup>3</sup> *Golden Terra v. Mahler*, 4 Morr. Min. Rep. 390; *Thompson v. Spray*, 72 Cal. 528; *Gregory v. Pershbaker*, 73 Cal. 109.

<sup>4</sup> *McGinnis v. Egbert*, 8 Colo. 41; *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299, 314; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 115; *Omar v. Soper*, 11 Colo. 380; *Mohr v. Hyman*, 20 Fed. 393; *Preston v. Hunter*, 67 Fed. 996, 999; *Faxon v. Barnard*, 4 Fed. 702; *Strepey v. Stark*, 7 Colo. 614; *Craig v. Thompson*, 10 Colo. 517.

<sup>5</sup> *Pelham & Inves v. Snodgrass*, 9 Colo. 339; *Hauswirth v. Butcher*, 4 Mont. 299; *Upton v. Larkin*, 3 Mont. 609.

<sup>6</sup> See, *ante*, § 219.



§ 331. **Locations made by agents.** — There is nothing in the Revised Statutes that prohibits one from initiating a location of a mining claim by an agent.<sup>1</sup> As the title comes from appropriation made in accordance with the law, and as it is not necessary that a party should personally act in taking up a claim, or in doing the acts required to give evidence of the appropriation, or to perfect the appropriation, it would seem, at least in the absence of a local rule or state statute to the contrary, that such acts are valid if done by one for another, or with his assent.<sup>2</sup> A location may be made without the knowledge of the principal, if there is a local rule authorizing it; otherwise, there may be antecedent authority or subsequent ratification.<sup>3</sup>

A party in whose name a mining claim is located is presumed to have assented to the location,<sup>4</sup> upon the principle that a party is presumed to assent to a deed or other act manifestly for his benefit.<sup>5</sup>

One of several co-locators of a mining claim may cause a notice of a mining claim to be recorded in the name of himself and others not present, and the location will be valid.<sup>6</sup>

When a location is made by one in the name of others, the persons in whose names it is made become vested with the legal title to the claim.<sup>7</sup> The estate so acquired cannot be divested by making a second location leaving out the names of the original locators, so long as the first location remains valid and subsisting.<sup>8</sup> If, however, they have

<sup>1</sup> *Schultz v. Keeler*, 2 Idaho, 305.

<sup>2</sup> *Gore v. McBrayer*, 18 Cal. 582, 587.

<sup>3</sup> *Thompson v. Spray*, 72 Cal. 528; *Murley v. Ennis*, 2 Colo. 300; *Morton v. Solambo C. M. Co.*, 26 Cal. 527, 534; *Hirbour v. Roeding*, 3 Mont. 13; *Welland v. Huber*, 8 Nev. 203; *Moritz v. Lavelle*, 77 Cal. 10; *Book v. Justice M. Co.*, 58 Fed. 106.

<sup>4</sup> *Kramer v. Settle*, 1 Idaho, 485; *Van Valkenburg v. Huff*, 1 Nev. 142, 149; *Rush v. French (Ariz.)*, 25 Pac. 816.

<sup>5</sup> *Gore v. McBrayer*, 18 Cal. 582, 588.

<sup>6</sup> *Kramer v. Settle*, 1 Idaho, 485; *Dunlap v. Pattison (Idaho)*, 42 Pac. 504.

<sup>7</sup> *Van Valkenburgh v. Huff*, 1 Nev. 142, 149; *Moore v. Hamerstag*, 109 Cal. 122.

<sup>8</sup> *Van Valkenburgh v. Huff*, 1 Nev. 113, 149; *Thompson v. Spray*, 72 Cal. 528; *Gore v. McBrayer*, 18 Cal. 582; *Morton v. Solambo C. M. Co.*, 26 Cal. 533.

abandoned or forfeited their rights by failure to perform the annual labor required by law,<sup>1</sup> or by failure to comply with the conditions of the agreement under which the location was originally made,<sup>2</sup> a relocation may be made by the original co-locator or agent in his own name.

### ARTICLE III. THE DISCOVERY.

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| § 335. Discovery the source of the miner's title.<br>§ 336. What constitutes a valid discovery.<br>§ 337. Where such discovery must be made. | § 338. The effect of the loss of discovery upon the remainder of the location.<br>§ 339. Extent of locator's rights after discovery and prior to completion of location. |
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§ 335. **Discovery the source of the miner's title.**—Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*. "Rewards so bestowed," says Gamboa, "besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends."<sup>3</sup>

While in some of the older countries of Europe, as in France and Belgium, the nature of the reward to the discoverer was something less than an absolute preference in the right of enjoyment, yet in Spain and Spanish-America there was guaranteed to him "an absolute right of property in the mine which he discovers if he will take the proper measures to denounce it and have it duly registered. No one can have any preference over him, and he loses the

<sup>1</sup> Saunders v. Mackey, 5 Mont. 523; Stang v. Ryan, 46 Cal. 33.

<sup>2</sup> Murley v. Eunis, 2 Colo. 300.

<sup>3</sup> Halleck's De Fooz on the Law of Mines, p. xxvi.

"rights which result from his discovery only through his own neglect to make it publicly known in the manner in which the law directs."<sup>1</sup>

This wise and liberal policy which pervaded the Mexican system at the time of the conquest and the acquisition of California by the United States became the recognized basis of mining rights and privileges as they were held and enjoyed under the local rules and regulations established by the miners occupying the public mineral lands within the newly acquired territory, and in all subsequent legislation, whether congressional, state, or territorial, discovery is recognized as the primary source of title to mining claims.<sup>2</sup>

As was said by Halleck in his introduction to De Fooz on the "Law of Mines,"<sup>3</sup> "Discovery is made the source of title, and development, or working, the condition of the continuance of that act."

Whatever may be the rule governing the acquisition of title to "claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place," of which we treat in a subsequent chapter, there can be no valid appropriation of a lode claim unless there has been an antecedent discovery. "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."<sup>4</sup>

A location can rest only upon an actual discovery of the vein or lode.<sup>5</sup> Such discovery must precede the location,<sup>6</sup> or be in advance of intervening rights.<sup>7</sup>

<sup>1</sup> Halleck's De Fooz on the Law of Mines, p. xxvii.

<sup>2</sup> Erhardt v. Board, 113 U. S. 527.

<sup>3</sup> San Francisco, 1860.

<sup>4</sup> Rev. Stats. § 2320.

<sup>5</sup> King v. Amy & Silversmith M. Co., 152 U. S. 222.

<sup>6</sup> Hauswirth v. Butcher, 4 Mont. 290; Upton v. Larkin, 7 Mont. 449; North Noonday M. Co. v. Orient M. Co., 6 Saw. 269, 309; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 109; Barker, McDonald, 2 Idaho, 646; Stinchfield v. Gibbs, 96 Cal. 33; McLaughlin v. Thompson, 2 Colo. App. 135; Waterloo M. Co. v. Doe, 56 Fed. 685; Ething v. Potter, 17 L. D. 424; N. P. R. R. Co. v. Marshall, 17 L. D. 545.

<sup>7</sup> Patchen v. Keeley, 19 Nev. 404; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 309; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 109; Golden Terra v. Mahler, 4 Morr. Min. Rep. 390; Wright v. Taber, 2 L. D. 738, 743; In re Mitchell, 2 L. D. 752.

Priority of discovery gives priority of right against naked location and possession, without discovery.<sup>1</sup>

It has been said that this requirement as to antecedent discovery is made for the benefit of the United States, so that land cannot be acquired under this law until its character is first ascertained to be mineral.<sup>2</sup>

When it is considered that lands of this character are only sold in limited quantities, and for a price in excess of that exacted for those agricultural in character, the statement seems illogical. It would seem that the object of the law is manifestly to encourage the exploration of the public domain and stimulate the development of its mineral resources, reserving the reward of enjoyment to him who first makes a *bona fide* discovery. That the statute should be construed in this light seems apparent, when we consider the general policy of the government with reference to its mineral lands.

It will be necessary for us to determine:—

- (1) What constitutes a valid discovery;
- (2) Where such discovery must be made;
- (3) The effect of the loss of discovery upon the remainder of the location.
- (4) The extent of a locator's rights after discovery and prior to completion of location.

§ 336. **What constitutes a valid discovery.**—In determining what constitutes such a discovery as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the definition of the terms "lode" or "vein," that the tendency of the courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode, or within the same surface boundaries, and toward strict rules of interpretation when the miner asserts rights in property which either *prima facie* belongs

<sup>1</sup> *Crossman v. Pendery*, 8 Fed. 693.

<sup>2</sup> *Upton v. Larkin*, 7 Mont. 449.

to some one else, or is claimed under laws other than those providing for the disposition of mineral lands, in which latter case the *relative* value of the tract is a matter directly in issue. The reason for this is obvious. In the case where two miners assert rights based upon separate alleged discoveries on the same vein, neither is hampered with presumptions arising from a prior grant of the tract, to overcome which strict proof is required. In applying a liberal rule to one class of cases and a rigid rule to another, the courts justify their action upon the theory, that the object of each section of the Revised Statutes, and the whole policy of the entire law, should not be overlooked.

The particular character of each case must be kept continually in view. "The fact is," said the circuit court of appeals, eighth circuit, in a recent case, "that there is a substantial difference in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein, or lode, between different claimants of the same lode under section twenty-three hundred and twenty of the Revised Statutes on the one hand, and a 'lode known to exist' within the limits of a placer claim at the time the application is made for a patent therefor under section twenty-three hundred and thirty-three, in the other."<sup>1</sup>

In the first class of cases, it was never intended to "weigh scales" to determine the value of the mineral found. In the latter class, the rule is different. Slight evidence of the existence of a lode might satisfy the demands of the law upon the question of discovery as the basis of location, when clear and convincing proof would be required to establish the existence of a "known vein" within a prior townsite or placer patent.

The supreme court of the United States clearly recognizes the distinction between the two classes of cases, by intimating that the land officers might, on a *prima facie* case, decide the right of an applicant to a vein or lode, and

<sup>1</sup> Migeon v. Mont. Cent. Ry., 77 Fed. 249, 255.

issue a patent therefor, upon a much less degree of proof than would be required where a conflict arises between a prior placer and subsequent lode patent.<sup>1</sup>

Even in the same line of cases, that court has at one time approved a liberal definition of a lode "known to exist" within a placer;<sup>2</sup> and at another, insisted upon adhering to strict rules of construction,<sup>3</sup> and ultimately announcing its conclusion, that after all it is a question for the jury; that it cannot be said as a matter of law, in advance, how much gold or silver must be found in a vein before it will justify exploitation and properly be called a "known vein."<sup>4</sup>

Judge De Witt, of the supreme court of Montana, in a dissenting opinion filed in the case of *Shreve v. Copper Bell M. Co.*,<sup>5</sup> and speaking for the court in the later case of *Brownfield v. Bier*,<sup>6</sup> reviewed all the adjudicated law upon the subject of what constitutes a "lode," as well as a "discovery," and clearly showed the reasons for the distinctions drawn between the two classes of cases.

To hold that, in order to constitute a discovery as the basis of the location, it must be demonstrated that the discovered deposit will, when worked, yield a profit, or that the lands containing it are, in the condition in which they are discovered, more valuable for mining than for any other purpose, would be to defeat the object and policy of the law.

Most, if not all, of the decisions arising out of controversies between lode claimants on the one hand and the owners of prior patented placers on the other, or between the holder of title under patented townsites and parties asserting rights under the mining laws, insist that, to fulfill the designation of known lodes, or veins, which are reserved out of that class of patents, such lodes, or veins,

<sup>1</sup> *Iron S. M. Co. v. Campbell*, 135 U. S. 286.

<sup>2</sup> *Iron S. M. Co. v. Cheestman*, 118 U. S. 529.

<sup>3</sup> *United States v. Iron S. M. Co.*, 128 U. S. 673.

<sup>4</sup> *Iron S. M. Co. v. Mike & Starr Co.*, 143 U. S. 394, 405.

<sup>5</sup> 11 Mont. 309.

<sup>6</sup> 15 Mont. 403.



must be clearly ascertained and be of such extent as to render the land more valuable on that account and *justify* their exploitation.<sup>1</sup>

No court has ever held, that in order to entitle one to locate a mining claim, ore of commercial value, in either quantity or quality, must first be discovered. Such a theory would make most mining locations impossible. "Logically carried out," says Judge Hawley,<sup>2</sup> "it would prohibit a miner from making any valid location until he had fully demonstrated that the vein, or lode, of quartz or other rock in place bearing gold or silver which he had discovered, would pay all the expenses of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it would lead to absurd, injurious, and unjust results."

It has been frequently said, that a valid location may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it, in expectation of finding ore, and such a location may be made of a ledge deep in the ground and appearing at the surface, not in the shape of ore, but in vein matter only.<sup>3</sup> But an *expectation* is something more than a *hope*. A location made in the "hope of finding some ore in it at some time" is worthless,<sup>4</sup> unless the hope should be realized before some one else makes a discovery. While the courts permit a liberal construction, the liberality must be exercised within reasonable and common sense limits. Locations are not permitted upon a conjectural or imaginary existence of a vein.<sup>5</sup>

There must be something beyond a mere guess on the part of the miner to authorize him to make a location

<sup>1</sup> United States v. Iron S. M. Co., 128 U. S. 673; Deffebach v. Hawke, 115 U. S. 392; Davis v. Weibbold, 139 U. S. 507, Dower v. Richards, 151 U. S. 658. See, *ante*, § 176.

<sup>2</sup> Book v. Justice M. Co., 58 Fed. 106, 124.

<sup>3</sup> Burke v. McDonald, 2 Idaho, 1022; Harrington v. Chambers, 3 Utah, 94; Mont. Cent. Ry. v. Migeon, 68 Fed. 811.

<sup>4</sup> Waterloo M. Co. v. Doe, 56 Fed. 685.

<sup>5</sup> King v. Amy & Silversmith M. Co., 152 U. S. 222, 227.



which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence.<sup>1</sup>

Every crevice or seam in the rock, even if filled with vein matter, does not necessarily constitute a vein.<sup>2</sup> But something must be found to distinguish it from the surrounding mass. "While the contents of ore-bearing veins "widely differ," said the supreme court of Idaho, "there "is that indescribable peculiarity in the ledge matter, the "matrix of all ledges, by which the experienced miner "easily recognizes his vein when discovered."<sup>3</sup>

Judge Hallett was of the opinion that the discovery must be of vein matter *in place* in the form of a vein, or lode.<sup>4</sup>

Discovery of detached pieces of quartz, mere bunches, or "float," is not sufficient.<sup>5</sup>

Neither the size nor richness of the vein is material.<sup>6</sup> Any *genuine* discovery is sufficient.<sup>7</sup>

While the courts may be unable to define with sufficient accuracy for all purposes what is necessary to constitute a discovery, they may have no difficulty in discriminating between the genuine and the counterfeit, the real and the sham

The land department, whose function it is to determine in all applications for patent what constitutes a discovery, has uniformly adopted a liberal rule of construction. In the judgment of that tribunal, a mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven when mineral is found and the evidence shows that a person of ordinary prudence would be justified

<sup>1</sup> Erhardt v. Boaro, 113 U. S. 527, 536.

<sup>2</sup> Burke v. McDonald, 2 Idaho, 646; Mont. Cent. Ry. v. Migeon, 68 Fed. 811.

<sup>3</sup> Burke v. McDonald, 2 Idaho, 646.

<sup>4</sup> Van Zandt v. Argentine M. Co., 8 Fed. 725, 727.

<sup>5</sup> Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107; Book v. Justice M. Co., 58 Fed. 106.

<sup>6</sup> See, *ante*, § 294, p. 376.

<sup>7</sup> O'Donnell v. Glenn, 8 Mont. 248, 252.

in a further expenditure of his labor and means with a reasonable prospect of success.<sup>1</sup>

The value of a mineral deposit is a matter into which the government does not inquire as between two mineral claimants. Inquiries of this character are confined to controversies between mineral and agricultural claimants.<sup>2</sup>

There is a material difference between a discoverer being *willing* to spend his time and money in exploiting the ground and being *justified* in doing so. The former is a question to be answered by the miner himself; the latter would present a question for expert testimony, and determination by a jury.<sup>3</sup>

But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would *justify* a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.<sup>4</sup>

Judge Hawley's definition seems to answer all practical purposes:—

“When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in making a location of a mining claim.”<sup>5</sup>

<sup>1</sup> *Castle v. Womble*, 19 L. D. 455.

<sup>2</sup> *Tam v. Story*, 21 L. D. 440.

<sup>3</sup> *Burke v. McDonald*, 2 Idaho, 1022.

<sup>4</sup> *McShane v. Kenkle* (Mont.), 44 Pac. 979.

<sup>5</sup> *Book v. Justice M. Co.*, 58 Fed. 106, 120.

The question of “discovery” will be found discussed to a limited extent in the following cases, not heretofore cited: *Southern Cross M. Co. v. Europa M. Co.*, 15 Nev. 383, 385; *Territory v. McKay*, 8 Mont. 168; *Davidson v. Bordeaux*, 15 Mont. 245; *Golden Terra M. Co. v. Mahler*, 4 Morr. Min. Rep. 390; *United States v. King*, 9 Mont. 75.

§ 337. **Where such discovery must be made.**—It is almost unnecessary to repeat what we have heretofore said, that title to a mining claim can only be initiated by discovery upon the unappropriated lands of the government. No rights are acquired by an entry within the surface lines of patented lands,<sup>1</sup> or other lands which are withdrawn from the body of the public domain.<sup>2</sup>

The discovery must be made within the limits of the location as it is ultimately marked upon the ground.<sup>3</sup>

A location based upon a discovery made within the limits of another existing and valid location is void.<sup>4</sup>

That a vein discovered in another location *may* penetrate the ground sought to be located, where there is no outcrop in the latter, and no physical evidence of the existence of the vein, is not proof of discovery within the limits.<sup>5</sup>

Any portion of the apex on the course, or strike, of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title.<sup>6</sup>

But a discovery of mineral must be treated as an entirety and as the proper basis of but one location. Therefore, it is not susceptible of subdivision for the purpose of two locations having a common end line that bisects the discovery shaft.<sup>7</sup>

<sup>1</sup> *Moyle v. Bullene*, 7 Colo. App. 308; *Golden Terra M. Co. v. Mahler*, 4 Morr. Min. Rep. 390.

<sup>2</sup> *Michael v. Mills*, 22 Colo. 439; *Armstrong v. Lower*, 6 Colo. 393. See, *ante*, § 322; *Branagan v. Dulaney*, 2 L. D. 744; *Winter Lode*, 22 L. D. 362.

<sup>3</sup> *Gwillim v. Donnellan*, 115 U. S. 45, 50; *Larkin v. Upton*, 144 U. S. 19, 23; *Upton v. Larkin*, 7 Mont. 449; *Id.* 5 Mont. 600; *Cheesman v. Shreeve*, 40 Fed. 787; *Michael v. Mills*, 22 Colo. 439; *Girard v. Carson*, 22 Colo. 345.

<sup>4</sup> *Branagan v. Dulaney*, 2 L. D. 744; *Little Pittsburg Cons. Co. v. Amie M. Co.*, 17 Fed. 57; *In re Williams*, 20 L. D. 458.

<sup>5</sup> *Michael v. Mills*, 22 Colo. 439; *Silver Jennie Lode*, 7 L. D. 6.

<sup>6</sup> *Larkin v. Upton*, 144 U. S. 19, 23; *Upton v. Larkin*, 5 Mont. 600; *Id.* 7 Mont. 449; *Golden Terra M. Co. v. Mahler*, 4 Morr. Min. Rep. 390.

<sup>7</sup> *Poplar Creek Cons. Quartz Mine*, 16 L. D. 1, 2; see, also, *McKinstry v. Clark*, 4 Mont. 370; *Morr. Mining Rights*, 8th ed. 35.

In a case arising under the laws of New Mexico as they existed in 1871, a locator divided his claim into three parts, and conveyed two of them to other parties. There was but one discovery shaft. The supreme court held, that the severance of title as to the two parts conveyed

Yet, where a discovery shaft sunk by a junior locator bisects a common boundary between him and a prior appropriator, and a portion of apex is found disclosed within the limits of the junior location, such a discovery is sufficient upon which to base the subsequent location.<sup>1</sup>

**§ 338. The effect of the loss of discovery upon the remainder of the location.**—As the discovered lode must lie within the limits of the location which is made by reason of it, if the title to the discovery fails, so must the location which rests upon it.

If there is but one point of discovery, and all workings are done at that point, a patent issued to another claimant, covering the place of working, restores the remainder of the ground to the public domain.<sup>2</sup>

In conformity with this rule, the land department refuses to issue a patent upon an application wherein the land upon which are situated the discovery shaft and improvements is expressly excepted therefrom, and the proof fails to show the discovery or existence of the mineral on the claim as applied for.<sup>3</sup>

A lode claim that is intersected by a prior location<sup>4</sup> or a patented millsite<sup>5</sup> must be confined to that part which contains a discovery shaft and improvements. It cannot be allowed to include ground not contiguous to that containing the discovery.

The exclusion of that portion of the claim which contains the discovery renders it incumbent upon the applicant

rendered a separate shaft on each part necessary. The case as reported does not state whether, or not, the discovery shaft had been sunk prior to the conveyance. *Zeckendorf v. Hutchison*, 1 New Mex. 476; 9 Morr. Min. Rep. 483.

<sup>1</sup> *Larkin v. Upton*, 144 U. S. 19, 23.

<sup>2</sup> *Gwillim v. Donnellan*, 115 U. S. 45, 50; *Miller v. Girard*, 3 Colo. Ct. App. 278; *Girard v. Carson*, 22 Colo. 345.

<sup>3</sup> *In re J. G. Kennedy*, 10 Copp's L. O. 150; *Antediluvian Lode*, 8 L. D. 602; *Independence Lode*, 9 L. D. 571; *Lone Dane Lode*, 10 L. D. 53; *In re Thomas J. Laney*, 9 L. D. 93.

<sup>4</sup> *Silver Queen Lode*, 16 L. D. 186.

<sup>5</sup> *Andromeda Lode*, 13 L. D. 146.

to show the existence of mineral within the remainder of the claim prior to the allowance of entry therefor.<sup>1</sup>

Such showing will authorize the entry of such remainder, as in such case it is not restored to the public domain.<sup>2</sup>

And the applicant may be permitted, after entry at the local land office and prior to patent, to establish these facts by supplemental proof.<sup>3</sup>

Judge Hallett has ruled, that a locator may sell or otherwise dispose of that portion of his location which covers his discovery and workings without affecting his right to the remainder.<sup>4</sup>

In the case in which this rule was announced, the sale was evidently brought about by the pendency of adverse proceedings. The decision was made before that of the supreme court of the United States in *Gwillim v. Donnellan*, heretofore cited.

The supreme court of California has attempted to qualify the rule announced by the supreme court of the United States in *Gwillim v. Donnellan*, and which has been followed uniformly by the land department, in a case where the discovery and workings were embraced within an agricultural patent, the mining locator subsequently acquiring the agricultural title.<sup>5</sup>

The court evidently strained the law to avoid sanctioning what it deemed an injustice. Work done on the patented agricultural land, if it had a manifest tendency to develop that part of the location excluded from the agricultural entry, would be considered in law as the equivalent of work done within the limits of the claim. But a discovery, without which no location possesses any potential force, and the only thing which gives it vitality, once passing by patent to another, can no more be used as the basis of acquiring title to unpatented lands, although

<sup>1</sup> *Cayuga Lode*, 5 L. D. 703.

<sup>2</sup> *In re Hagland* on review, 1 L. D. 593.

<sup>3</sup> *Spur Lode*, 4 L. D. 100.

<sup>4</sup> *Little Pittsburg Cons. M. Co. v. Ainie M. Co.*, 17 Fed. 57.

<sup>5</sup> *Richard v. Wolfing*, 98 Cal. 195.

held by the same owner, than can a discovery in one mining claim be used as the basis of locating another. Certainly, no patent could ever be obtained to the remainder of the mining claim upon the facts shown in the California case, unless other discoveries were made within such remainder. It is manifest, that the ruling of Judge Hallett and the decision of the supreme court of California are opposed to the weight of authority. Loss of discovery results in loss of location, unless a new discovery is made within the excluded ground prior to the inception of intervening rights. Such new discovery will save the remainder from reverting to the body of the public domain.

§ 339. **Extent of a locator's rights after discovery and prior to completion of location.**—When a prospector has made such a discovery as will satisfy the law and form the basis of the location, he is allowed, in most of the states and territories, a specified time in which to perform the remaining acts which are requisite to perfect the location. As to whether, in the absence of such legislation and district rules, the discoverer has any appreciable time within which to mark his boundaries and complete his location, is a subject upon which the courts differ. The supreme court of California holds, that while if the locator be on the ground actually engaged in making the location, another could not locate over him, yet in the absence of local rules authorizing it, no time is allowed to perfect the location; that until it is actually marked on the ground, the claim is not appropriated so as to prevent its acquisition by a subsequent locator.<sup>1</sup>

The circuit court of appeals for the eighth circuit was called upon to determine the question upon the same evidence and the same state of facts arising in one of the California cases,<sup>2</sup> and that tribunal declined to accept the rule announced by the California courts. The court of

<sup>1</sup> *Newbill v. Thurston*, 65 Cal. 419; *Paaris v. Muldoon*, 75 Cal. 284.

<sup>2</sup> *Newbill v. Thurston*, 85 Cal. 419.



appeals held, that after a discovery and posting a notice thereof, the locator had a reasonable time in which to complete the location; that what was a reasonable time would depend upon the facts of each particular case; that evidence of customs prevalent in other localities on this subject might be received for the purpose of aiding the court in its determination, and that, under the circumstances of that case, twenty days was a reasonable time.<sup>1</sup>

The doctrine announced by the circuit court of appeals is in consonance with the views expressed by the supreme courts of Nevada<sup>2</sup> and Idaho,<sup>3</sup> and accords with the spirit of the law as interpreted by the supreme court of Colorado<sup>4</sup> and the supreme court of the United States.<sup>5</sup>

To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim, in order to protect it from invasion and claims of other persons, would be an unreasonable, if not impossible, requirement.<sup>6</sup>

As to what is a reasonable time for the completion of the location, depends upon the nature of the ground to be located, the means of properly marking, and the ability to properly ascertain the dimensions and course, or strike, of the vein.<sup>7</sup>

As so much depends upon the locator determining the position of his vein in the earth and the course of its apex, and the consequences of a failure to make his location and establish his end lines, as the law contemplates, being accompanied with such serious results, it would seem that congress never intended to compel the discoverer to

<sup>1</sup> *Doe v. Waterloo M. Co.*, 70 Fed. 455; affirming decision of Judge Ross, *Doe v. Waterloo*, 55 Fed. 11.

<sup>2</sup> *Golden Fleece M. Co. v. Cable Cons. M. Co.*, 12 Nev. 312, 329; *Gleeson v. Martin White M. Co.*, 13 Nev. 442; testimony of Chief Justice Beatty, Rep. Pub. Land Com. 399.

<sup>3</sup> *Burke v. McDonald*, 2 Idaho, 446.

<sup>4</sup> *Murley v. Ennis*, 2 Colo. 300; *Patterson v. Hitchcock*, 3 Colo. 533; *Marshall v. Harney Peak Tin M. Co.*, 1 S. Dak. 350.

<sup>5</sup> *Erhardt v. Board*, 113 U. S. 527.

<sup>6</sup> *Omar v. Soper*, 11 Colo. 380.

<sup>7</sup> *Doe v. Waterloo M. Co.*, 70 Fed. 455, 460.



immediately proceed at his peril with the marking of his boundaries. The posting of a preliminary notice, though not specially authorized by statute, should be sufficient to protect the discoverer for a reasonable time, at least, within which he might determine approximately the all-important facts upon which the value of his property to a great degree depends.

As to what is a reasonable time, is a question of law.<sup>1</sup>

In states or localities where the laws or district regulations fix a given time within which certain acts subsequent to the discovery are required to be performed, the posting of a preliminary notice specifying the name of the lode, date of discovery, and the intention to locate the claim is equivalent to actual possession.<sup>2</sup>

Whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made so as to disclose whether a vein or deposit of such richness exists as to justify the work to extract the metal. Otherwise, the whole purpose of allowing the free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession, instead of previous discovery, would determine the rights of the claimants.<sup>3</sup>

The effect of this rule is practically to reserve, after the discovery and during the statutory period allowed for perfecting the claim, a surface area circular in form, the radius of which may be the length claimed on the discovered lode, within which area the location may be ultimately made. Such is the manifest intent of the rule. This was the custom under the act of 1866. The miner posted his notice, claiming so many linear feet on the vein; and under the law as then interpreted, prior to fixing the *situs* of his lode,

<sup>1</sup> Patterson v. Hitchcock, 3 Colo. 533, 540.

<sup>2</sup> Erhardt v. Boaro, 5 Fed. 692.

<sup>3</sup> Erhardt v. Boaro, 113 U. S. 527, 535; Marshall v. Harney Peak Tin M. Co., 1 S. Dak. 350; Omar v. Soper, 11 Colo. 380.

by filing a diagram for patent purposes, he might follow the vein wheresoever it ran to the length claimed.<sup>1</sup>

When he filed his diagram and inclosed his lode within surface boundaries, his right to pursue the vein on its course ceased when it passed out of his surface lines.<sup>2</sup>

Under the existing state of the law, the location must be marked within a certain period of time, whereupon the locator's rights become definitely fixed and confined, except as to the extralateral right, to his marked boundaries. Until this is done, however, and within the prescribed periods, his right to be protected to the extent heretofore stated is well settled.

If he fails to comply with the law within the statutory period, his rights would thereafter be no greater than the rights of one in possession without discovery. He might protect his *pedis possessio* against forcible intrusion and hold it as against one having no higher right;<sup>3</sup> but he would be a mere occupant without color of title, and his possession must yield to any one possessing the necessary qualifications, who enters peaceably and in good faith for the purpose of perfecting a valid location.<sup>4</sup>

#### ARTICLE IV. THE DISCOVERY SHAFT AND ITS EQUIVALENT.

§ 343. State legislation requiring development work as prerequisite to completion of location.

§ 344. Object of requirement as to development work.

§ 345. Relationship of the discovery to the discovery shaft.

§ 346. Extent of development work.

**§ 343. State legislation requiring development work as prerequisite to completion of location.**—Of the precious-metal-bearing states, neither California, Oregon, Utah, Nevada, nor Washington have thus far enacted any laws requiring work of any character to be performed as a

<sup>1</sup> Johnson v. Parks, 10 Cal. 447. See, ante, § 58.

<sup>2</sup> See, ante, § 60.

<sup>3</sup> Crossman v. Pendery, 8 Fed. 693; Field v. Grey (Ariz.), 25 Pac. 793.

<sup>4</sup> See, ante, "Occupancy without color of title," §§ 216-219.

prerequisite to the completion of a location;<sup>1</sup> therefore, as to such states this article is inapplicable.

The states and territories hereinafter enumerated, however, have supplemented federal legislation by requiring that certain preliminary development work in the nature of a discovery shaft, or its equivalent, shall be performed as a condition precedent to the completion of a lode location. As these state statutes are frequently important factors necessary to be considered in construing and applying decisions of the state courts, we will present an outline of the provisions found in the several states and territories upon this subject, taking the state of Colorado as a basis of comparison.

*Colorado.*—The laws of Colorado require the filing for record of a location certificate within three months from the date of discovery.<sup>2</sup> Prior to the expiration of this time, and within sixty days from the time of uncovering or disclosing the lode,<sup>3</sup> the discoverer must sink a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or deeper, if necessary, to show a well-defined crevice.<sup>4</sup> Any open cut, crosscut, or tunnel which shall cut a lode at the depth of ten feet below the surface, or an adit of at least ten feet in, along the lode from the point where the lode may be in any manner discovered, is equivalent to the discovery shaft.<sup>5</sup>

*Arizona.*—Within ninety days from the date of discovering the lode and posting notice thereon,<sup>6</sup> a discovery shaft must be sunk within the premises claimed to a depth of at least ten feet from the lowest rim of such shaft at the surface, and deeper, if necessary, until there is shown by such

<sup>1</sup>The legislatures of most of the mining states are in session as this treatise goes to the press. Any modification in the existing state laws which may take effect before the completion of the work, will be found in its appropriate place in the appendix.

<sup>2</sup>Mills' Annot. Stats., § 3150.

<sup>3</sup>*Id.*, § 3155.

<sup>4</sup>*Id.*, § 3152.

<sup>5</sup>Mills' Annot. Stats., § 3154.

<sup>6</sup>Laws of 1895, p. 54, § 6.

work a lode deposit or mineral in place.<sup>1</sup> Any open cut, crosscut, adit, or tunnel which shall be made as above provided for, as a part of the location, and which shall be equal in amount of work to a shaft ten feet deep, and four feet wide by six feet long, and which shall cut a lode or mineral in place at the depth of ten feet from the surface, is equivalent as discovery work to a shaft sunk from the surface.<sup>2</sup>

*Idaho.*—The locator must complete his location by marking his boundaries within three days from the date of discovery.<sup>3</sup> Within sixty days from the date of location, the locator must sink a shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and of not less than sixteen square feet in area. Any excavation which shall cut such vein ten feet from the lowest part of the rim of such shaft, and which shall measure one hundred and sixty cubic feet in extent, shall be considered a compliance with this provision.<sup>4</sup>

*Montana.*—After discovery, the initial step in the series of acts culminating in a completed location is the posting of a notice.<sup>5</sup> Before the expiration of ninety days from the date of such posting, the locator must sink a discovery shaft to the same depth as required by the laws of Colorado, except that to the words "well-defined crevice" is added "or valuable deposit." The equivalent of such shaft is the same as in Colorado.<sup>6</sup>

*New Mexico.*—Within ninety days from the time of taking possession,<sup>7</sup> and prior to recording the notice of location

<sup>1</sup> Laws of 1895, p. 53, § 3.

<sup>2</sup> *Id.*, p. 53, § 5.

<sup>3</sup> Rev. Stats., § 3101 as amended; Laws of 1895, p. 26.

<sup>4</sup> Stats. 1895, p. 27, § 3.

<sup>5</sup> Pol. Code, § 3610.

<sup>6</sup> *Id.*, § 3611.

<sup>7</sup> There is nothing in the statutes of New Mexico fixing the time within which possession is to be taken, or defining what constitutes such possession. A notice is required to be posted, and within three months to be recorded. The posting of this notice is probably "taking possession."

(three months after posting), the locator must sink a discovery shaft upon the claim to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or must drive a tunnel, opencut, or adit upon such claim, exposing mineral in place at least ten feet below the surface.<sup>1</sup>

*North Dakota.*—The locator must record a location certificate within sixty days from the date of discovery,<sup>2</sup> and before filing such certificate for record, must sink a discovery shaft on the claim sufficient to show a well-defined mineral vein or lode.<sup>3</sup> There is also a provision granting the locator sixty days from the time of uncovering or disclosing the lode in which to sink such shaft.<sup>4</sup> The statute is evidently drawn on the lines of the Colorado law, with this marked distinction: In Colorado, the shaft must be sunk within *three months* from the date of the discovery, and within sixty days from uncovering or disclosing the lode, suggesting that the locator might have thirty days after discovery to uncover or disclose his lode. In North Dakota, the time is fixed at sixty days from date of discovery (*i. e.* before recording the notice), and sixty days from uncovering or disclosing the lode. To give the statute effect in all its parts, the uncovering or disclosing the lode must be construed as meaning the *discovery*. If this be not true, then the locator might have an indefinite time in which to uncover and disclose his lode.

If a discovery should be made on January 1st, the certificate must be recorded on or before March 2d. If the lode is not uncovered or disclosed until the 5th of January, unless the construction we place upon the law is correct, the locator would have until March 8th to sink his shaft, rendering the requirement that he should perform this development work before the certificate is recorded nugatory. It would therefore seem that the provision allowing sixty days from the uncovering of the lode in which to sink

<sup>1</sup> Laws of 1889, p. 42.

<sup>2</sup> Rev. Pol. Code 1895, § 1428.

<sup>3</sup> Rev. Pol. Code 1895, § 1430.

<sup>4</sup> *Id.*, § 1433.

the shaft is inoperative unless that act is understood to mean the *discovery*.

Any open cut, crosscut, or tunnel, at a depth sufficient to disclose the mineral vein, or lode, or an adit of at least ten feet along the lode from the point where the lode may be in any manner discovered, is equivalent in North Dakota to a discovery shaft.<sup>1</sup>

*South Dakota.*—The laws upon this subject in South Dakota are the same as in North Dakota.<sup>2</sup>

*Wyoming.*—The locator is required to sink a shaft upon the discovered lode or fissure to the depth of ten feet from the lowest rim of the shaft at the surface within one hundred and twenty days from the date of discovery.<sup>3</sup>

Any open cut which shall cut the vein ten feet in length, and with face ten feet in height, or any crosscut tunnel, or tunnel on the vein, ten feet in length which shall cut the vein ten feet below the surface, measured from the bottom of such tunnel, is considered the equivalent of a discovery shaft.<sup>4</sup>

**§ 344. Object of requirement as to development work.**—The object of this class of legislation is two fold. —

(1) To demonstrate to a reasonable degree of certainty that the deposit sought to be located as a lode is in fact a vein of quartz or other rock in place;

(2) To compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws.

The Colorado act, which is the parent of all the others, was passed in 1874, about the time of the discovery of the blanket carbonate deposits in the Leadville regions. In these localities, the vein exposures, such as answered the popular definition of outcrop, were few, along the sides of eroded gulches, and the underlying beds were in the main

<sup>1</sup> Rev. Pol. Code 1895, § 1432.

<sup>2</sup> Comp. Laws of Dak. 1887, §§ 1900, 2001, 2003, 2004. Adopted by South Dakota—Laws of 1890, ch. 105, § 1.

<sup>3</sup> Laws of 1890-01, pp. 179, 180.

<sup>4</sup> Laws of 1888, p. 88, § 18.



reached by vertical shafts sunk from the surface through the overlying "slide" and white porphyry to the contact with the blue limestone, where the ore bodies, in certain geological horizons, were usually encountered. In many of these cases, there was no real discovery from the surface. The miner's "indications" consisted of the development of work of his neighbors and the generally accepted geological theories.

The vertical depth from the surface to the deposits varied in localities, so the law required the shaft to be sunk to a sufficient depth to show a well-defined crevice. These local conditions, if they were not the moving cause of the enactment, certainly proved its wisdom.

On the other hand, in the absence of this class of state legislation, alleged discoveries may be made, and after marking boundaries, the locator is allowed a year from the first day of January next succeeding the date of his location within which to do one hundred dollars' worth of work. Until that time elapses, he is not called upon to do anything. In many instances, he does no work until compelled to, and about the time the period elapses, he "resumes" work which he never commenced, and each succeeding first day of January finds him again in a state of "resumption." During this period, in a large number of cases which have come under our personal observation, the location is a threat, preventing others who might be willing to develop the ground from acquiring rights. The requirement that some genuine development work should be done as a condition precedent to the perfection of a lode location, is wise and beneficial, and the courts uniformly enforce the law—not with rigid strictness, but with fairness and liberality. In our judgment, this class of state legislation was contemplated by congress when it enacted the mining laws.

§ 345. **Relationship of the discovery to the discovery shaft.**—As Mr. Morrison in his "Mining Rights" tersely states,<sup>1</sup> "the fact of discovery is a fact of itself, to be totally

<sup>1</sup> 8th ed., p. 27.



"disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location subsequent to discovery."

When we speak of the discovery shaft, we mean to include in that term the various equivalents provided for by the several state enactments, as hereinbefore outlined.

As heretofore demonstrated, the discovery must be within the limits of the location as ultimately defined, and upon land that is free and open to exploration. The same rule applies to the discovery shaft.<sup>1</sup> But it is not required that the development work shall be performed at the point where the first discovery is made. The locator may make any shaft he may sink his discovery shaft,<sup>2</sup> provided always, that he discloses within it his well-defined crevice or mineral "in place." The first discovery may not always indicate to the miner the appropriate place where economic considerations require his development work to be done.<sup>3</sup> For the purpose of enabling him to determine these facts and select his place, the state laws grant him fixed periods within which to make his selection and complete his location, with the necessary condition attached, that if he fails to disclose his vein at or below the depth required by the local laws, and within the specified period, his ground will become subject to relocation by the next comer.

His original discovery will protect him in his possession during the statutory period,<sup>4</sup> but if he permits that period to lapse, and fails to perform his development work and accomplish the results contemplated by law, his possession must yield to the next comer who succeeds by peaceable methods in initiating a right. As is said by

<sup>1</sup> *Armstrong v. Lower*, 6 Colo. 393; *Upton v. Larkin*, 5 Mont. 600; *Morr. Min. Rights*, 8th ed. p. 31.

<sup>2</sup> Charge of Judge Hallett in *Van Zandt v. Argentine M. Co.*, as outlined in *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478, 481. This charge as reported in 8 Fed. 725; 4 *Morr. Min. Rep.* 441, does not contain this element.

<sup>3</sup> *Harrington v. Chambers*, 3 Utah, 94.

<sup>4</sup> *Erhardt v. Boaro*, 113 U. S. 527; *Marshall v. Harney Peak Tin Co.*, 1 S. Dak. 350; *Omar v. Soper*, 11 Colo. 380.

Mr. Morrison, the neglect of the locator to comply with this requirement is equivalent to an abandonment of the inchoate right given by discovery.<sup>1</sup> The discovery has performed its office. The perfected location rests ultimately on the completed development work. This we understand to be the rule announced by Judge Hallett in the Adelaide-Camp Bird case,<sup>2</sup> and we are not aware of any adjudicated case to the contrary. It is true, that the supreme court of Utah<sup>3</sup> and the United States circuit court, ninth circuit, district of California,<sup>4</sup> have announced that it is not necessary that the locator should show the existence of a vein in any particular place, provided it is shown to exist in some portion of the claim; but it must be borne in mind, that neither the laws of Utah nor California require the performance of development work as a prerequisite to a perfected location,<sup>5</sup> and in the absence of such local legislation it is not required.

An original discovery may be made in the discovery shaft, even after a location has been perfected, and this will be sufficient in the absence of intervening rights.<sup>6</sup>

§ 346. **Extent of development work.**—While in some of the states under consideration<sup>7</sup> the requirements of the law are satisfied when the discovery shaft or opening shows a well-defined mineral vein, or lode, regardless of the vertical distance from the surface at which it is disclosed, the others<sup>8</sup> require a certain depth in case of the shaft, and length in case of other openings, and this requirement must be fulfilled, although the vein is disclosed before reaching the required distance,<sup>9</sup> thus giving sanction to

<sup>1</sup> Morr. Min. Rights, 8th ed., p. 27.

<sup>2</sup> Van Zandt v. Argentine M. Co., 8 Fed. 725.

<sup>3</sup> Harrington v. Chambers, 3 Utah, 94.

<sup>4</sup> North Noonday M. Co. v. Orient M. Co., 6 Saw. 299.

<sup>5</sup> See, *ante*, § 343.

<sup>6</sup> Strepy v. Stark, 7 Colo. 619; Zollars & H. C. C. M. Co. v. Evans, 2 McCrary, 39. See, *ante*, § 330.

<sup>7</sup> North and South Dakota.

<sup>8</sup> Colorado, Arizona, Idaho, Montana, New Mexico, and Wyoming.

<sup>9</sup> Morr. Min. Rights, 8th ed., p. 33.

the view hereinbefore expressed, that the object of requiring development work was two fold.<sup>1</sup>

For example, the discovery shaft must be at least ten feet deep. It must be deeper if, at the required vertical distance from the lowest rim, the vein or crevice be not disclosed. It is hardly profitable to discuss the consequences flowing from a failure to strictly comply with the requirements as to depth, if the proper vein exposure is found within the required distance. Prudent miners will not jeopardize valuable rights by failing to comply fully with the law, and courts will readily detect a manifest attempt at evasion.

The requirement as to disclosing the vein, crevice, or deposit in place, which terms are legal equivalents, is unquestionably mandatory. As to what constitutes such a vein, is to be determined by the rules announced by the courts in the adjudicated cases, which have been fully presented in preceding articles,<sup>2</sup> and need not here be repeated.

A former statute of Montana required the discovery shaft to disclose at least one wall of the vein,<sup>3</sup> but this has since been repealed.

In construing the provisions of the Colorado statute providing for development by adit, which in mining parlance is an opening on and along the vein used for drainage, the supreme court of Colorado has held, that it was the legislative intention to substitute horizontal development in and along the lode for ten feet, in lieu of a discovery shaft of that depth, and that the distance below the surface at which the vein appeared in place as the result of this class of development was immaterial.<sup>4</sup>

The same court also determined that an "adit" need not be altogether under cover.<sup>5</sup>

<sup>1</sup> See, *ante*, § 344

<sup>2</sup> See, *ante*, §§ 286-301.

<sup>3</sup> Foote v. National M. Co., 2 Mont. 402; O'Donnell v. Glenn, 8 Mont. 248.

<sup>4</sup> Gray v. Truby, 6 Colo. 278; Craig v. Thompson, 10 Colo. 517, 526.

<sup>5</sup> Electro-Magnetic M. & D. Co. v. Van Auken, 9 Colo. 204; Craig v. Thompson, 10 Colo. 517, 526.

ARTICLE V. THE PRELIMINARY NOTICE AND ITS POSTING.

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| <p>§ 350. Local customs as to preliminary notice, and its posting prior to enactment of federal laws—Not required by congressional law.</p> <p>§ 351. State legislation requiring the posting of notices.—States grouped.</p> | <p>§ 352. First group.</p> <p>§ 353. Second group.</p> <p>§ 354. Third group.</p> <p>§ 355. Liberal rules of construction applied to notices.</p> <p>§ 356. Place and manner of posting.</p> |
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§ 350. Local customs as to preliminary notice, and its posting prior to enactment of federal laws—Not required by congressional law.—During the period when mining privileges upon the public domain were governed exclusively by the local regulations and customs of miners, the first step in the inception of the miner's right, after the discovery, was the posting of a notice at some point on, or in reasonable proximity to, the discovered lode, usually upon a tree, stake, or mound of rocks.<sup>1</sup> The posting of this notice served to manifest the intention of the discoverer to claim the vein to the extent described, and to warn all others seeking new discoveries that there was a prior appropriation of the lode to which the posted notice applied.

These notices were of the simplest character, were required to be in no particular form, and were generally prepared by unlettered men. They served the purpose, however, and enabled any one seeking in good faith to locate claims, to ascertain the extent and nature of the right asserted on the particular lode by the prior discoverer.

During this period, it will be remembered, as well as during the period immediately preceding the passage of the act of May 10, 1872, the lode was the principal thing sought, and the surface was a mere incident.<sup>2</sup>

<sup>1</sup> Yale on Mining Claims and Water Rights, p. 78; J. Ross Browne's Mineral Resources, 1867, pp. 236-242; Gleeson v. Martin White M. Co., 13 Nev. 450.

<sup>2</sup> Johnson v. Parks, 10 Cal. 447; Patterson v. Hitchcock, 3 Colo. 533, 544; Wolfley v. Lebanon M. Co., 4 Colo. 112; Walrath v. Champion M. Co., 63 Fed. 552.

The locator could hold but one vein,<sup>1</sup> and while surface boundaries were eventually in some way defined, neither the form nor extent of such surface, prior to filing the diagram for patent, controlled the rights on the located lode.<sup>2</sup>

While the act of 1872 changed all this,<sup>3</sup> and required the marking of surface limits inclosing the located lode, it did not dispense with the necessity of posting the preliminary notice, when such was required by state or district rules, nor destroy its usefulness in the absence of any such regulations. While, in the absence of state legislation or district regulations, the posting of a notice on the claim is not required at any stage of the proceedings culminating in the completion of the location,<sup>4</sup> the prospector's first impulse upon discovering a lode is to post his notice. While his failure to so do, where the state law or local custom do not require it, is accompanied with no deprivation of right, yet it may be safely said, that the practice of posting a notice of this character is almost universal.

§ 351. **State legislation requiring the posting of notices—States grouped.**—There are no state statutes requiring the posting of any notice whatever in either California, Utah, Washington, or Nevada. In these states the subject is left entirely to district regulation, in the absence of which no posting is required, although, as heretofore indicated, it is the universal custom to initiate the right by placing on the ground a preliminary or discovery notice.

For the purpose of disclosing the nature of the legislation on this subject in the other precious-metal-bearing

<sup>1</sup> Eureka Case, 4 Saw. 302, 323; *Eclipse G. & S. M. Co. v. Spring*, 50 Cal. 304.

<sup>2</sup> See, *ante*, § 58.

<sup>3</sup> See, *ante*, §§ 70, 71.

<sup>4</sup> *Haws v. Victoria C. M. Co.*, 160 U. S. 303; *Gird v. California Oil Co.*, 60 Fed. 531, 536; *Book v. Justice M. Co.*, 58 Fed. 106, 115; *Allen v. Dunlap*, 24 Ore. 229; *Carter v. Bacigalupi*, 83 Cal. 187, 192.

states and territories, we may group them into three classes:—

- (1) Those requiring a preliminary notice which has no reference to the recorded certificate of location;
- (2) Those wherein the posted notice bears a direct relation to the recorded certificate;
- (3) Those requiring two different notices to be posted — one a preliminary, or discovery notice, the other conforming to the certificate which must ultimately be recorded.

§ 352. **First group:—**

*Colorado* requires to be posted at the point of discovery on the surface a plain sign, or notice, containing: (1) the name of the lode; (2) the name of the locator; (3) the date of discovery. This posting must precede the recording of the certificate of location, but otherwise the posted notice is wholly disconnected from the recorded instrument.<sup>1</sup>

*Montana.*—The Montana law adds to the requirements of the Colorado law: (4) the number of linear feet each way from the point of discovery; (4a) the width on each side of the center of the vein; (4b) the general course of the vein. Nothing is said as to when the notice shall be posted, but the inference is, that it should be done at the time of the discovery.<sup>2</sup>

*North Dakota*<sup>3</sup> and *South Dakota*<sup>4</sup> add to the Colorado requirements: (4) the number of feet claimed in length on either side of the discovery; (5) number of feet in width on either side of the lode.

*Oregon* requires a notice to be posted on the lead or vein, “with names attached.” Nothing is specified as to the contents of the notice.<sup>5</sup>

<sup>1</sup> Mills' Annot. Stats., § 3152.

<sup>2</sup> Rev. Code, 1895, § 3610.

<sup>3</sup> *Id.*, § 1430, sub. 2.

<sup>4</sup> Comp. Laws of Dakota, 1887, § 2001. Adopted by South Dakota—Laws of 1890-91, ch. cv., § 1.

<sup>5</sup> Hill's Annot. Laws, 1887, § 3828.



*Wyoming.*—The requirements in this state are the same as in Colorado, except that the name of the discoverer must also appear, suggesting that the locator and discoverer may be different persons.<sup>1</sup>

**§ 353. Second group:—**

*New Mexico* provides for the posting, in some conspicuous place on the location, of a notice in writing, stating: (1) the names of the locators; (2) the intent to locate the claim; (3) a description by reference to some natural object or permanent monument. A copy of this notice as posted must be recorded.<sup>2</sup>

*Arizona* requires the posting, at the point of discovery on the surface, of a plain sign or notice, substantially conforming to the certificate to be recorded, which must contain: (1) name of claim; (2) name of locator; (3) date of location; (4) number of feet in length and width on each side of the center of the shaft; (5) the general course of lode or premises; (6) locality of the claim with reference to natural monuments.<sup>3</sup>

**§ 354. Third group:—**

*Idaho* is the only state in this group. Its laws provide for the posting of two notices:—

(1) At the time of the discovery, when a monument must be erected at the place of discovery, upon which the locator must place his name, the date of discovery, and the distance claimed along the vein each way from such monument;

(2) At the time of marking his boundaries he must post another notice, the requirements of which are much more elaborate, and a substantial copy of which must be recorded.<sup>4</sup>

<sup>1</sup> Laws of 1888, p. 88, § 17.

<sup>2</sup> Comp. Laws 1884, p. 754, § 1566.

<sup>3</sup> Laws of 1895, p. 53, § 1.

<sup>4</sup> *Id.*, p. 25, § 1.



§ 355. **Liberal rules of construction applied to notices.**—The statutory requirements found in the first group of states, and the first requirement in the third group, are nothing more than the perpetuation of the system in vogue during the early history of the mining industry of the west. They preserve the simplicity of the primitive system and recognize the fact that miners are unacquainted with legal forms, and usually are out of reach of legal assistance.<sup>1</sup> A sample of these preliminary notices may be found in the reports of any of the mining states. A case involving the following notice, arising under the statute of Colorado, heretofore referred to, reached the supreme court of the United States: “Hawk Lode.—We, the undersigned, claim fifteen hundred feet “on this mineral-bearing lode, vein, or deposit,”—dated and signed by the locators. It was contended, and the court below held, that the notice was insufficient because it failed to designate the number of feet on each side of the discovery point. The supreme court of the United States ruled, however, that as the law did not require the linear distances from the discovery monument to be stated, the notice and its posting was a valid appropriation of the lode to the extent of seven hundred and fifty feet on each side of the posted notice.<sup>2</sup> In construing these notices, both the courts and land department have been uniformly liberal. As they are generally made by unlettered men, it would be productive of a great hardship if prospectors should be held to technical accuracy in their preparation. If they are sufficiently certain to put an honest inquirer in the way of ascertaining where the lode is, that is sufficient.<sup>3</sup>

When we deal with cases, however, arising under laws similar to those found in Arizona and New Mexico, and provisions like those of Idaho, in reference to the second

<sup>1</sup> *Carter v. Bacigalupi*, 83 Cal. 187, 193.

<sup>2</sup> *Erhardt v. Boaro*, 113 U. S. 527.

<sup>3</sup> *Prince of Wales Lode*, 2 Copp's L. O. 2; *Carter v. Bacigalupi*, 83 Cal. 187, 193; *Gird v. California Oil Co.*, 60 Fed. 531, 544; *Book v. Justice M. Co.*, 58 Fed. 106; *Doe v. Waterloo M. Co.*, 70 Fed. 455.

notice required by that state to be posted, we encounter a different element. Where the posted notice is the basis of the one to be ultimately recorded, the provisions of the federal law are operative, and the posted notice must contain the requirements of that law as to the contents of the record.

A notice might serve the purpose of a notice of discovery manifesting an intention to locate, and be wholly insufficient as a notice of perfected location which is to be recorded.<sup>1</sup>

In the absence of a state statute or local rule requiring it, the posted notice need not contain any reference to natural objects or permanent monuments, but the recorded notice must contain such description.<sup>2</sup>

If a statute or local rule prescribes the form of a notice to be posted, and provides that a copy of such notice shall be recorded, if such notice does not contain the requirement of the federal statute it is an insufficient record. The supreme court of California has said, that where district rules provide for the recording of a copy of a posted notice, such record is sufficient;<sup>3</sup> but this must not be understood as sanctioning a rule, that if a posted notice does not contain the facts required by section twenty-three hundred and twenty-four of the Revised Statutes, providing for the contents of the record, that the record of such posted notice is sufficient. Neither a local rule nor a state statute can dispense with the plain requirements of the federal law.<sup>4</sup>

§ 356. **Place and manner of posting.**—Most of the state laws requiring notices to be posted fix the point of discovery as the place of posting. Naturally, this will be on the lode, or in such reasonable proximity as will identify it.

<sup>1</sup> *Doe v. Waterloo M. Co.*, 70 Fed. 455, 458; *Gleeson v. Martin White M. Co.*, 13 Nev. 405; *Gird v. California Oil Co.*, 60 Fed. 531, 536.

<sup>2</sup> *Brady v. Husby*, 21 Nev. 453; *Poujade v. Ryan*, 21 Nev. 449; *Southern Cross M. Co. v. Europa M. Co.*, 15 Nev. 383.

<sup>3</sup> *Carter v. Bacigalupi*, 83 Cal. 187.

<sup>4</sup> See, *post*, art. ix.

In California, a local district custom required that a notice of location of a quartz claim should be in writing, "and "posted conspicuously in a conspicuous place upon the "claim located, at or near the lode line of said claim."

The supreme court of that state held, that such a notice, written on one side of a sheet of paper which was folded with the writing inside and placed upon a mound of rocks three feet high, underneath two flat rocks, with a margin of the paper exposed to view, the rest being obscured by the two stones which covered it, was a conspicuous posting in a conspicuous place, and satisfied the rule.<sup>1</sup>

An artificial mound of rocks on the line of a lode is a conspicuous object which would naturally attract the attention of one seeking information as to a former location of a lode, and the slightest examination of the mound would result in the discovery of a written notice.

In another case in the same state, it was held, that a written notice placed in a tin can, and the can placed in a mound of rocks, was sufficient posting.<sup>2</sup>

It is manifest, that some precaution should be taken to protect the notice from destruction by exposure to wind and weather.

In the absence of any specific direction in the state statute or district regulation prescribing the manner of posting, any device adopted, which would enable one seeking information in good faith, to discover the existence of the notice, should be sufficient.<sup>3</sup> The posting of such a notice after a *bona fide* discovery is an appropriation of the territory specified for the period allowed by local rules or state legislation for the performance of the remaining acts required to complete the location, and the appropriator is entitled during that period to be protected in his possession against all comers.<sup>4</sup>

<sup>1</sup> Donahue v. Miester, 88 Cal. 121.

<sup>2</sup> Gird v. California Oil Co., 60 Fed. 531, 544.

<sup>3</sup> *Id.*

<sup>4</sup> Erhardt v. Boaro, 113 U. S. 527, 537; Marshall v. Harney Peak Tin M. & M. Co., 1 S. Dak. 350; Omar v. Soper, 11 Colo. 380, 387.

ARTICLE VI. THE SURFACE COVERED BY THE LOCATION—  
ITS FORM AND RELATIONSHIP TO THE LOCATED LODE.

- |  |                                   |
|--|-----------------------------------|
| § 360. The ideal location.                             | § 364. Surface must include apex. |
| § 361. Surface area, length, and width of lode claims. | Location on the dip.              |
| § 362. Location covering excessive area.               | § 365. The end lines.             |
| § 363. Surface conflicts with prior locations.         | § 366. The side lines.            |
|  | § 367. Side-end lines.            |

§ 360. **The ideal location.**—When we speak of an ideal location, we mean one which not only responds to all the requirements of the law, but one which confers upon its possessor the greatest possible property right, and conforms to the judicial theories of what constitutes the highest type of a perfected location. The ideal is rarely encountered in the practical mining world, but it furnishes a convenient standard with which the every-day location may be compared, enabling us to show to what extent a departure from the ideal diminishes the property rights which are susceptible of acquisition under a location of the highest possible type.

The ideal location must have for its basis an ideal lode, such a one as we have described and illustrated in a preceding section.<sup>1</sup> With this assumed, we should describe the highest type of a location as a rectangular parallelogram, the lines crossing the apex of the lode at right angles to the general course of the vein, termed in law the end lines, the extremities of which are equi-distant from the center of the vein, the side lines parallel to the course of the vein, that is, equi-distant throughout from a line drawn through the center of the apex on its longitudinal course; such a location as is represented in figure 5.<sup>2</sup> Without intending to enter into a discussion at this time of the extralateral right, we may say that this form of location confers upon the possessor the greatest

<sup>1</sup> See, *ante*, § 309.

<sup>2</sup> See, *ante*, § 309.

property rights susceptible of being conveyed under the mining laws applicable to lode claims. It is to this standard that the various forms of locations on the surface which may come under discussion in the future will be compared.

§ 361. **Surface area, length, and width of lode claims.**—Prior to the passage of the act of July 26, 1866, the number and length of claims on a discovered lode, and the extent of surface ground which might be occupied and enjoyed therewith, was, like everything else connected with mining upon the public domain during that period, regulated by district rules or local customs. The act of 1866 fixed the limit of a single claim at two hundred feet in length along the vein, for each locator, except the discoverer, who was entitled to two claims. No person could make more than one location on the same lode, and not more than three thousand feet could be taken by any association of persons.<sup>1</sup>

As to width, this was left entirely to local regulations. When the claimant filed the diagram of his lode on application for patent, he was called upon to extend his claim laterally, so as to conform to the local laws, customs, and rules of miners.<sup>2</sup> In some districts, the width was specified with reference to either the center of the vein or its inclosing walls. In others, the locator was allowed a reasonable quantity of surface. As the lode was the principal thing, and the surface a mere incident, neither the form nor extent of the surface area controlled the rights on the located lode.<sup>3</sup>

The act of May 10, 1872, which is incorporated into the Revised Statutes, changed this rule, giving to the surface boundaries a controlling importance.<sup>4</sup> It fixed the maximum length on the vein at fifteen hundred feet, and a maximum surface width of six hundred feet, three

<sup>1</sup> 14 Stats. at Large, p. 252, § 4.

<sup>2</sup> *Id.*, § 2.

<sup>3</sup> See, *ante*, § 58.

<sup>4</sup> See, *ante*, § 71.

hundred feet on each side of the middle of the vein, at the surface.<sup>1</sup>

State or district regulation may limit this width to a minimum of twenty-five feet on each side of the middle of the vein,<sup>2</sup> and we cannot see why the length of a claim may not likewise be limited by state or local rules within the maximum.<sup>3</sup>

Be that as it may, where state statutes deal with the subject at all they follow the lines of the federal law,<sup>4</sup> and no such limitation has ever been attempted by district regulations within our knowledge.

As to width, the maximum allowed by the federal law is the rule, except in a few localities. In Gilpin, Clear Creek, Boulder, and Summit counties, in the state of Colorado, the width is fixed by statute at seventy-five feet on each side of the center of the vein. In all other counties of that state, it is one hundred and fifty feet on each side of the center of the vein,<sup>5</sup> which rule obtains in North Dakota<sup>6</sup> and South Dakota.<sup>7</sup>

These three states also provide, that any county at any general election may determine upon a greater width within the limitations of the federal laws, but Mr. Morrison informs us,<sup>8</sup> that this privilege has never been exercised.<sup>9</sup>

With the exceptions above noted, the customary surface area is, therefore, fifteen hundred by six hundred feet,

<sup>1</sup> 17 Stats. at Large, p. 91, § 2.

<sup>2</sup> Rev. Stats, § 2320; *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299, 305; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 104; *Copp's Min.*, Dec. 201; *In re Taylor*, 9 Copp's L. O. 52, 92.

<sup>3</sup> Mr. Morrison, in his *Mining Rights*, 8th ed., p. 17, doubts the power of the state to so limit the length, but gives no reason for his conclusion other than the fact that no attempt in that direction has ever been made.

<sup>4</sup> See, *ante*, § 250 (1).

<sup>5</sup> Mills' Annot. Stats. § 3149; *Morr. Min. Rights*, 8th ed., p. 19.

<sup>6</sup> Rev. Code 1895, § 1427.

<sup>7</sup> *Comp. Laws of Dak.* 1897, § 1998. Adopted by South Dakota — *Laws of 1890*, ch. cv.

<sup>8</sup> *Morr. Min. Rights*, 8th ed., p. 20.

<sup>9</sup> See, *ante*, § 250 (2).

embracing twenty and two-thirds acres. This may be called the unit of lode locations.

It is entirely immaterial how many or how few locators participate in this class of locations. The size of the "claim," or, more properly, the location, is not governed by the number of persons participating in its appropriation. There is nothing in the law which prevents any one locator or any set of locators from appropriating as many locations on the same lode as they may be able to find independent discoveries upon which to base them,<sup>1</sup> but no location may exceed the statutory limit as to length and width.

§ 362. **Location covering excessive area.**—It frequently happens, that the locator marking his surface without the aid of chain or compass includes within his boundaries an area in excess of the statutory limit.

The courts uniformly hold, that such a location, where it injures no one at the time it is made, and it has been made in good faith, is voidable only to the extent of the excess.<sup>2</sup>

Upon application for patent, the monuments may be moved and the lines drawn in to cast off the excess.<sup>3</sup>

An excessive location cannot be said to be a fraud upon others. It cannot take away rights already acquired by prior appropriation. A location within the statutory limit cannot accomplish this. As to subsequent locators, they can measure the ground from the preliminary discovery

<sup>1</sup> Copp's Min. Dec. 207.

<sup>2</sup> *Rose v. Richmond M. Co.*, 17 Nev. 25; *Richmond M. Co. v. Rose*, 114 U. S. 576, 580; *Glacier Mt. S. M. Co. v. Willis*, 127 U. S. 471, 481; *Hauswirth v. Butcher*, 4 Mont. 299; *Leggatt v. Stewart*, 5 Mont. 107, 109; *Iakin v. Dolly*, 53 Fed. 333; *S. C. on appeal*, 54 Fed. 461; *Thompson v. Spray*, 72 Cal. 528; *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 107; *Atkins v. Hendree*, 1 Idaho, 95; *Burke v. McDonald*, 2 Idaho, 646; *Stein Winder M. Co. v. Emma & L. C. M. Co.*, 2 Idaho, 421. Affirmed on appeal to U. S. Sup. Ct. (not officially reported), *Law. Co-op. ed.*, book 37, p. 941. *Hanson v. Fletcher*, 10 Utah, 266; *Howeth v. Sullenger*, 113 Cal. 541.

<sup>3</sup> *In re Empey*, 10 Copp's L. O. 102; *Howeth v. Sullenger*, 113 Cal. 547.



notice, which is universally posted at, or in reasonable proximity to, the point of discovery.<sup>1</sup> This notice itself, as a rule, specifies the linear distance claimed from the discovery point, and where it does not, the locator can only claim seven hundred and fifty feet along the vein on each side of his discovery notice.<sup>2</sup>

If the prior locator has too much ground, it is easy to discover it; and all the benefit that a subsequent locator can claim is, that he shall be entitled to maintain his right to the excess.<sup>3</sup>

In a locality where neither state law nor district rule require the posting of a preliminary notice at the discovery point,<sup>4</sup> a case might arise where a location, as marked, includes so large an area as to give rise to the suspicion of bad faith. In such a case, where such preliminary notice is wanting, there would be nothing to guide the subsequent locator, and the excessive location should be held worthless for any purpose. A fifteen-hundred-foot claim cannot be shifted from one end to the other of a two-thousand-foot claim, as circumstances might require, to cover the discovery of a third person within the two-thousand-foot location.<sup>5</sup>

As we have heretofore stated, however, the general, if not universal, rule is, to hold this class of locations void only as to the excess.

**§ 363. Surface conflicts with prior locations.** -As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent. Many of them arise

<sup>1</sup> See, *ante*, § 350.

<sup>2</sup> *Erhardt v. Board*, 113 U. S. 527.

<sup>3</sup> *Atkins v. Hendree*, 1 Idaho, 95, 100.

<sup>4</sup> See, *ante*, § 350.

<sup>5</sup> *Hauswirth v. Butcher*, 4 Mont. 209; *Leggalt v. Stewart*, 5 Mont. 107, 109.

from honest mistake, others from premeditated design. In both instances the question of priority of appropriation is the controlling element which determines the rights of the parties. Two locations cannot legally occupy the same space at the same time. These conflicts sometimes involve a segment of the same vein, on its strike; at others, they involve the dip bounding planes underneath the surface. More frequently, however, they pertain to mere overlapping surfaces. The same principles of law apply with equal force to all classes of cases. Such property rights as are conferred by a valid prior location, so long as such location remains valid and subsisting, are preserved from invasion, and cannot be infringed or impaired by subsequent locators. To the extent, therefore, that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void.

However regular in form, it is of no effect while there is a valid prior location subsisting.<sup>1</sup>

A location to be effectual must be good at the time it is made. The subsequent abandonment or forfeiture of the conflict area by the senior appropriator would not inure to the benefit of the subsequent locator.<sup>2</sup>

The junior locator might, subsequent to the abandonment or forfeiture of the conflict area by the senior, amend his location and include the overlapping surface;<sup>3</sup> but without some act on his part manifesting an intention to make a new appropriation or acquire a new right after the abandonment or forfeiture became effectual, this area would not by mere gravity become a part of the junior location.<sup>4</sup>

**§ 364. Surface must include apex — Location on the dip.**— There can be no question but that the act of July

<sup>1</sup> *Belk v. Meagher*, 3 Mont. 65; S. C. on appeal, 104 U. S. 279; *Garthe v. Hart*, 73 Cal. 541; *Souter v. Maguire*, 78 Cal. 543; *Armstrong v. Lower*, 6 Colo. 393; *Aurora Hill Cons. v. 85 M. Co.*, 12 Saw. 355.

<sup>2</sup> *Belk v. Meagher*, 104 U. S. 279, 285; *Oscarap v. Crystal River M. Co.*, 58 Fed. 293, 295.

<sup>3</sup> *Johnson v. Young*, 18 Colo. 625.

<sup>4</sup> *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30, 36.

26, 1866,<sup>1</sup> as well as all subsequent legislation of congress, contemplates that the location shall be made along the course or strike of the lode.<sup>2</sup>

A location cannot be made on the middle part of a vein, or otherwise than on the top, or apex.<sup>3</sup>

Any portion of the apex on the course, or strike, of the vein will be sufficient to support the location,<sup>4</sup> but upon the extent and course of this apex within the location depends the extent of rights acquired.

In the case of *Van Zandt v. Argentine M. Co.*,<sup>5</sup> Judge Hallett charged the jury, that a junior location along the line of the top, or apex, could not prevail against a senior location on the dip of the lode.

In some of his prior rulings, the judge used language which, considered in the abstract, is not altogether consistent with this charge. For example, he has held, that "it is a part of the statute law of the United States that locations shall be upon the top and apex of the vein; . . . that being done gives the miner the whole vein";<sup>6</sup> and that the locator "must find where this top and apex is, and make his location with reference to that."<sup>7</sup>

As we understand the views of Judge Hallett, considering all his decisions, he maintains the opinion, that to invoke the right of lateral pursuit, the locator must cover the apex in such a way as will permit him to follow his vein underneath the claim of a *junior* locator; that a senior

<sup>1</sup> Eureka Case, 4 Saw. 302; *McCormick v. Varnes*, 2 Utah, 355; *Woolley v. Lebanon*, 4 Colo. 112.

<sup>2</sup> *Flagstaff M. Co. v. Tarbet*, 98 U. S., 463, 467; *Argentine M. Co. v. Terrible M. Co.*, 122 U. S., 478, 485; *Iron S. M. Co. v. Elgin*, 118 U. S. 196; *Doe v. Sanger*, 83 Cal., 203. *Watervale v. Leach* (Ariz.), 93 Pac. 418; *King v. Amy & Silversmith M. Co.*, 9 Mont. 743.

<sup>3</sup> *Iron S. M. Co. v. Murphy*, 2 Met'ary, 121; *Id.*, 1 Morr. Min. Rep. 548; *Stevens v. Williams*, 1 Morr. Min. Rep. 557; *Leadville M. Co. v. Fitzgerald*, 4 Morr. Min. Rep., 390; *Larkin v. Upton*, 144 U. S., 19; *Colorado Central C. M. Co. v. Turck*, 50 Fed. 888; S. C. on rehearing, 54 Fed. 267.

<sup>4</sup> *Larkin v. Upton*, 144 U. S. 19.

<sup>5</sup> 8 Fed. 725, 728.

<sup>6</sup> *Iron S. M. Co. v. Murphy*, 1 Morr. Min. Rep. 548, 550, 551.

<sup>7</sup> *Stevens v. Williams*, 1 Morr. Min. Rep., 557, 562.

locator on the dip will hold everything within vertical planes drawn through the surface boundaries, and exclude the junior apex locator, but will himself obtain no extralateral right.

A full discussion of this question necessarily involves the subject of extralateral rights, which it is our intention to treat separately in a subsequent chapter. In advance of this, however, we do not hesitate, with all due deference to the views of the distinguished jurist, to say that, as we read the decisions of the supreme court of the United States,<sup>1</sup> and those of the circuit court of appeals in the eighth circuit,<sup>2</sup> the Eureka cases, as well as other cases to be commented on when we reach the subject of dip rights, the doctrine announced by him in the Van Zandt-Argentine case is not the true doctrine.

The question of priority is only an important and material inquiry, either when there are overlapping surfaces, or where both contending parties have some portion of the apex of the same vein, and a conflict arises between them involving dip planes underneath the surface, such as are found in the Tyler-Last Chance litigation.<sup>3</sup>

A patent once issued, the existence of an apex will be presumed;<sup>4</sup> but, prior to patent, the holder of a location, if his right is challenged, must show to some extent, at least, the apex of a discovered vein within the limits of the claim.

Mr. Morrison adopts the views of Judge Hallett, and cites *discoveries* by tunnel, which are uniformly upheld as supporting the validity of a location on the dip.<sup>5</sup>

<sup>1</sup> Flagstaff M. Co. v. Tarbet, 98 U. S. 463; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 485; Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196; Larkin v. Upton, 144 U. S. 19; Gwillim v. Donnellan, 115 U. S. 45, 47.

<sup>2</sup> Colorado Cent. Cons. M. Co. v. Turck, 50 Fed. 888, although in the opinion on rehearing (54 Fed. 263), the court reserved the question; Colorado Cent. Cons. M. Co. v. Turck, 70 Fed. 294, 295, wherein the question seems to be decided practically on the lines of the case reported in 50 Fed. 888.

<sup>3</sup> 54 Fed. 284; 71 *Id.* 848; 61 *Id.* 557; 157 U. S. 683.

<sup>4</sup> Iron S. M. Co. v. Campbell, 17 Colo. 267.

<sup>5</sup> Morr. Min. Rights, 8th ed., p. 127.

A discovery may be made anywhere within the limits of a claim as ultimately located, but Judge Hallett himself ruled, that after a discovery in a tunnel, it is just as necessary to mark the boundaries on the surface and file a certificate for record as in any other case.<sup>1</sup>

Mr. Morrison also accepts this view,<sup>2</sup> which is undoubtedly the correct one, and suggests, that in fixing the surface lines in cases of discovery by tunnel, approximate calculations should be made for the dip, with a view, of course, to cover the apex.

We think it well established, that ledges which have their apices outside the boundaries of a location do not as a matter of law belong to the locator. As a matter of presumption, a patentee of a location on the dip may be held to own everything between vertical planes drawn through his surface boundaries; but we expect to be able to fully demonstrate, when we deal with the subject of extra-lateral rights, that this presumption must yield in the presence of the junior locator of the apex if his surface lines are properly constructed with reference to such apex.

We are free to admit, that Judge Hallett's views, as expressed in the Van Zandt case, owing to the peculiar geological conditions existing in some sections of Colorado, afford, from an economic standpoint, a satisfactory method of solving some of the difficulties with which that distinguished jurist has been confronted in his judicial experience; but we do not think, with all due deference to his opinions, that the equilibrium of the entire law should be disturbed by novel conditions existing in isolated localities in the mining regions. If the law is odious, its rigid enforcement will secure its repeal or amendment.

§ 365. **The end lines** —The function of end lines may be said to be twofold: —

(1) They stop the pursuit of the vein on its strike;

<sup>1</sup> *Rico Aspen Cons. M. Co. v. Enterprise M. Co.*, 53 Fed. 321.

<sup>2</sup> *Morr. Min. Rights*, 8th ed., p. 182.

(2) When properly constructed with reference to the located lode, permitting the exercise of the extralateral right, they may be produced indefinitely in their own direction, so that vertical planes drawn downward through them, as so produced, carve out a segment of the vein throughout its entire depth, the ownership of which becomes vested in the locator.

The location of a mining claim, as made and defined, must control not only the rights of the claimant to the vein, or lode, within its surface, but also any lateral rights. The locator must stand upon his own location, and can take only what it will give him under the law. The courts cannot relocate his claim and make new side or end lines.<sup>1</sup>

As heretofore observed,<sup>2</sup> the act of 1866 did not in terms mention end lines, although in the sense that they were necessary to determine the right to pursue the vein on the strike, they were implied.<sup>3</sup> They were not required to be parallel;<sup>4</sup> therefore, the failure to make them so was accompanied with no penalty.

Under the act of May 10, 1872, however, their substantial parallelism, or at least their non-divergence in the direction of the dip, is an absolute essential to the right of extralateral pursuit. It has been said that the provisions of this act as to parallelism are merely directory, and that no consequence is attached to a deviation from its direction.<sup>5</sup> By this it may be understood that a location with non-parallel end lines is a valid location, and if other conditions are complied with, it will, subject to the dip rights of others who have properly located on the apex, hold everything within vertical planes drawn through the surface boundaries. The rights conferred, however, by such a location are not as great as in case of one having the end

<sup>1</sup> King v. Amy & Silversmith M. Co., 152 U. S. 222.

<sup>2</sup> See, *ante*, § 58.

<sup>3</sup> Eureka Case, 4 Saw. 302.

<sup>4</sup> Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196.

<sup>5</sup> Eureka Case, 4 Saw. 302, 319; Horswell v. Ruiz, 67 Cal. 111.

lines parallel. The consequences of non-parallelism of end lines will be fully presented in a subsequent chapter when dealing with the subject of extralateral rights.

While it may be true, that the highest type of the theoretical location may imply that the end lines of a location should be at right angles to the general course of the vein, there is nothing in the law which requires it, either expressly or by implication. While the ideal location is in the form shown in figure 16, where the end lines

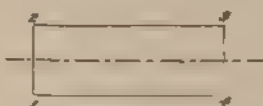


FIGURE 16.

cross the lode at right angles to its general course, a location marked on the ground with end lines crossing the lode at acute or obtuse angles, as indicated in figures 17 and 18, is just as valid and complete, and the extent of

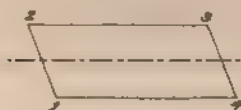


FIGURE 17.

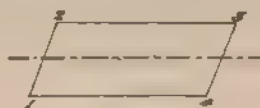


FIGURE 18.

property rights conferred thereby just as great, as in the ideal location, as the end lines cross the lode, and the side lines are parallel with and along its general course. The land officers have no right to require that an end line shall make a right angle, or any other particular angle, with the general direction of the vein. It is the locator's privilege to give such direction to his end lines as he pleases, so long as they are across the vein, are parallel to each other, and the length of the lode measured between them does not exceed the statutory limit of fifteen hundred feet.<sup>1</sup>

<sup>1</sup> Monarch of the North Mining Claim, 8 Copp's L. O. 104.



It is a matter of common knowledge, that veins are not of uniform value throughout, but that frequently the "pay ore" occurs in "shoots," at intervals in the course of the vein, and that these "shoots" have frequently, in the language of the miner, a right or left-hand "pitch." There is no reason why the locator should not be permitted to mark his end lines, observing the statutory requirement as to parallelism, with regard to the pitch of the ore bodies within the vein, if he is fortunate enough to detect their existence and direction during his work of preliminary exploration.

If it be true, and the courts so assert, that the theory of the law requiring this parallelism is, that the miner may only have as much of the lode underneath as he has apex within his surface, then the object is accomplished by making a location in the form suggested by figures 17 and 18, as well as by that suggested by figure 16. The subsequent locator is in no sense injured, and will be compelled to either make his location conform to the lines of the first discoverer, or take the chance of losing a segment of the vein by underground conflict with the prior appropriator.<sup>1</sup>

It must be borne in mind, however, that the failure to construct the end lines so that they are parallel to each other does not render the location absolutely void, so long as it is within the statutory limit. A location in the form of a horseshoe<sup>2</sup> or an isosceles triangle<sup>3</sup> will, subject to the extralateral right of others who have properly located the apex, hold whatever may be found within vertical planes drawn through the surface boundaries; provided, of course, that such irregularly-shaped figures include some portion of the apex of a discovered vein.

The requirement as to parallelism of end lines, as a condition precedent to the exercise of the extralateral right, means that they should be parallel throughout, or at least should not diverge in the direction of the dip. This

<sup>1</sup> Flagstaff M. Co. v. Tarbet, 98 U. S. 463; Eureka Case, 4 Saw. 302.

<sup>2</sup> Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196.

<sup>3</sup> Montana Co. Limited v. Clark, 42 Fed. 626.

requirement of the law is not satisfied by constructing broken end lines, as shown in figure 19, and a survey for patent made in such form would be rejected.<sup>1</sup> Where the



FIGURE 19.

location as originally marked upon the ground has non-parallel end lines, it may be rectified at any time, if such rectification does not interfere with intervening rights.<sup>2</sup>

A locator of a mining claim may abandon a portion of his original location without forfeiting any rights he may have to the remainder of the claim.<sup>3</sup>

There is no necessity for the two end lines being of the same length. If they both cross the lode and one parallels the other, the fact that one may be six hundred feet long and the other shorter is entirely immaterial. The end lines as finally established should be *throughout their length* upon the public domain. We do not admit that a junior locator has any right to invade the surface of a senior proprietor for any purpose. If the lode of the junior locator on its course reaches or crosses the properly established surface boundaries of a prior location, the right to pursue the vein beyond that point cannot be asserted. The end line of the junior must either conform to the crossed boundary of the senior, or he must, at the expense of abandoning a portion of the lode, so construct his end lines that no part of them shall be on territory previously appropriated.

We are aware, that in the manual of instructions issued by the land department on October 25, 1895, the commissioner of the general land office, construing prior issued circulars, sanctions the right of the junior to extend one

<sup>1</sup> Instructions to Surveyor Gen'l, 10 Copp's L. O. 86.

<sup>2</sup> *Doe v. Sanger*, 83 Cal. 203; *Doe v. Waterloo M. Co.*, 54 Fed. 935.

<sup>3</sup> *Tyler M. Co. v. Sweeney*, 54 Fed. 284; *Last Chance M. Co. v. Tyler M. Co.*, 61 Fed. 557; *Tyler M. Co. v. Last Chance M. Co.*, 71 Fed. 848.

half of his end line within the surface lines of a prior location, as shown by the line *ab* in figure 20, the location B representing the prior location; but we are of the opinion,

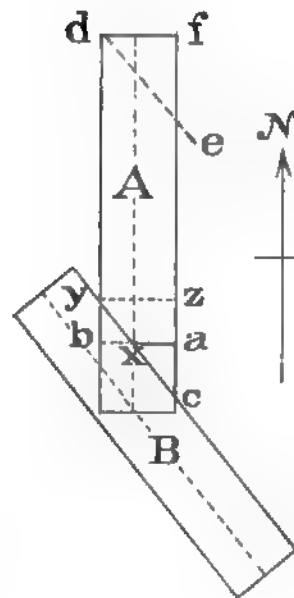


FIGURE 20.

that this is based upon an erroneous construction of the law. If the triangle *xyb* is a part of a prior valid appropriation, A. has no right to appropriate it. At best, the line *xb* could be nothing more than an imaginary one, and mining rights upon the public domain cannot be based upon imaginary lines. As heretofore indicated, in our judgment, A. must adopt either the lines *yc* and *de*, or *yz* and *df*.

It is not to be understood, that the mere marking of the location in the first instance, by placing monuments within the limits of a prior location, will render the subsequent location void. This frequently occurs, and the junior location is held to be valid to the

extent that it covers vacant and unappropriated ground if the monuments are within the statutory limit.<sup>1</sup> Many irregularly shaped locations, such as the triangle in *Montana Limited v. Clark*,<sup>2</sup> are the results of this doctrine.

Our contention is, that the junior locator's rights will be determined, in case of his neglect to rectify his lines, by reference to the intersected boundaries of the senior locator, regardless of where the junior's monuments are placed, or the course of the lines connecting them.

This discussion suggests the question of "cross lodes"—a subject to be fully considered in a subsequent chapter.<sup>3</sup>

<sup>1</sup> *Doe v. Tylor M. Co.*, 73 Cal. 21; *West Granite M. & M. Co. v. Granite M. & M. Co.*, 7 Mont. 356. See, *post*, art. vii. of this chapter.

<sup>2</sup> 42 Fed. 626.

<sup>3</sup> See, *post*, tit. vi., ch. ii.

§ 366. **The side lines.**—The primary function of the side lines is, to connect the opposite extremities of the end lines, and to complete the enclosure of a surface within which is found the apex of the discovered lode. As the width of a location is fixed with reference to the middle of the vein, the law contemplates that this must be ascertained by actual exploration and development, and cannot be assumed to be in an unexplored position.<sup>1</sup>

Where the vein outcrops at the surface, there can be no question as to the point from which the lateral measurement must begin. When the discovery shaft develops the vein at some distance below the surface, and the locator does not determine by any further development that the nearest actual surface point is elsewhere, and the fact does not otherwise appear, the land department has ruled, that for executive purposes, the middle of the vein as disclosed in the shaft will be assumed to be the point from which lateral measurements are to be calculated.<sup>2</sup>

According to the regulations of the department, lateral measurements cannot extend more than three hundred feet on either side. Four hundred feet cannot be taken on one side and two hundred on the other; but if, by reason of prior claims, the full width allowed cannot be taken on one side, the locator will not be restricted to less than three hundred feet on the other.<sup>3</sup>

Side lines, properly drawn, run on each side of the course of the vein, distant not more than three hundred feet from the middle of such vein;<sup>4</sup> but there is no requirement that they should be parallel.<sup>5</sup> So long as they keep within the statutory width they may have angles and elbows, as in figure 21, or converge toward each other, as in figure 22, without jeopardizing any rights so far as the located lode is concerned, if the end lines are properly constructed with

<sup>1</sup> *In re* Albert Johnson, 7 Copp's L. O. 35.

<sup>2</sup> *In re* Hope Mining Co., 5 Copp's L. O. 116; par. 10, Circ. Instructions, Dec. 10, 1891 (see appendix).

<sup>3</sup> Par. 10, Circ. Instructions, Dec. 10, 1891 (see appendix).

<sup>4</sup> *King v. Amy & Silversmith M. Co.*, 152 U. S. 222.

<sup>5</sup> *Stevens v. Williams*, 1 Morr. Min. Rep. 503.

reference to such lode. A locator, whose surface lines are constructed as in figure 22, of course obtains less area than is embraced in the ideal location, but otherwise he suffers

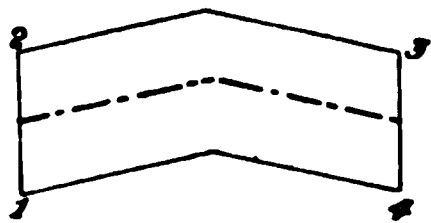


FIGURE 21.

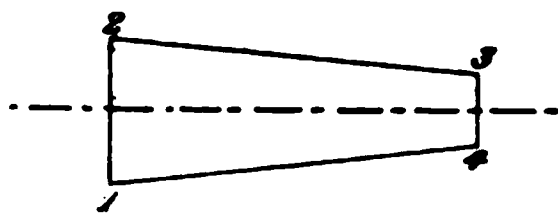


FIGURE 22.

no diminution of rights from those acquired by the ideal. The parallelism or non-parallelism of the side lines may, however, become an important factor if the locator makes a mistake, as he frequently does, as to the course of his vein, and locates crosswise instead of along the vein.

Where a location is of excessive width, the excess should be cast off, so that the middle of the vein shall be in the center of the location.<sup>1</sup>

§ 367. **Side-end lines.**—End lines are not always those which are designated as such by the locator. If the vein does not cross the line called by him an end line, it is not in law an end line. In such case it performs the mere function of a side line. In all cases where a vein crosses a side line, the side line performs the function of an end line to the extent, at least, that it stops the pursuit of the vein on its strike. It is therefore called in law an end line.<sup>2</sup> We call it a side-end line for descriptive purposes. Whether the side-end line performs the function of an end line for the purpose of determining the extralateral right, will depend upon circumstances. If the vein crosses two side lines, substantially as in the Flagstaff-Tarbet<sup>3</sup> and

<sup>1</sup> *Lakin v. Dolly*, 53 Fed. 333.

<sup>2</sup> *Flagstaff M. Co. v. Tarbet*, 98 U. S. 463; *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478; *King v. Amy & Silversmith M. Co.*, 152 U. S. 222; *Eilers v. Boatman*, 3 Utah, 159; *Stevens v. Williams*, 1 Morr. Min. Rep. 557; *Tombstone M. & M. Co. v. Wayup M. Co. (Ariz.)*, 25 Pac. 794; *Water-vale M. Co. v. Leach (Ariz.)*, 33 Pac. 418; *Colorado Cent. R. R. v. Turck*, 50 Fed. 888; *Id.* on rehearing, 54 Fed. 262; *Tyler M. Co. v. Sweeney*, 54 Fed. 284.

<sup>3</sup> 98 U. S. 463.

Argentine-Terrible<sup>1</sup> cases, where the crossed side lines were parallel, we do not see why the vein could not be followed on its downward course throughout its entire depth, between vertical planes drawn downward through the side-end lines, produced indefinitely in their own direction. If the side-end lines are not parallel, as indicated in figure 22, and the dip of the vein is towards their convergence, these lines may be extended in their own direction until they meet, and the locator may pursue the vein in depth to the vertical line of junction between the two planes. If the dip is in the direction of the divergence, there would certainly be no extralateral right. The consideration, however, of this character of cases, together with those where a vein crosses one end and one side line, will be deferred until we reach the subject of extralateral rights.

#### ARTICLE VII. THE MARKING OF THE LOCATION ON THE SURFACE.

§ 371. Necessity for, and object of, marking.	§ 374. State statutes defining the character of marking.
§ 372. Time allowed for marking.	§ 375. Perpetuation of monuments.
§ 373. What is sufficient marking under the federal law.	

§ 371. **Necessity for, and object of, marking.**—The Revised Statutes of the United States<sup>2</sup> contain the mandatory provision, that the "location must be distinctly marked "upon the ground so that its boundaries may be readily "traced." There is no escape from this requirement. While it is possible that state statutes or local district regulations may particularize as to the character of the marking, they cannot dispense with the necessity for compliance with the law of congress. While, as we shall hereafter point out, time is allowed within which to establish the

<sup>1</sup> 122 U. S. 478.

<sup>2</sup> § 2324.

boundaries, until this is done the location is not complete.<sup>1</sup> The requirement is an imperative and indispensable condition precedent of a valid location, and is not to be "frittered away by construction."<sup>2</sup> After the discovery, it is the main act of original location.<sup>3</sup> This was the rule under the Spanish and Mexican law.<sup>4</sup> The object of the law in requiring the location to be marked on the ground is, to fix the claim, to prevent floating or swinging, so that those who, in good faith, are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue.<sup>5</sup> It also operates to determine the right of the claimant as between himself and the general government.<sup>6</sup>

§ 372. **Time allowed for marking.**—In the absence of state legislation or district regulation, it has been held, in California, that while a party in actual possession, proceeding with diligence to mark his boundaries, would be protected as against a stranger attempting to relocate, yet, strictly speaking, no time is allowed to the locator to complete his location by marking it on the surface.<sup>7</sup> This view is also adopted by the supreme court of Oregon.<sup>8</sup>

But, as heretofore indicated,<sup>9</sup> the circuit court of appeals for the ninth circuit, upon the same state of facts presented in one of the California cases,<sup>10</sup> declines to accept the

<sup>1</sup> *Belk v. Meagher*, 104 U. S. 279; *Strepey v. Stark*, 7 Colo. 614; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53; *Gilpin County M. Co. v. Drake*, 8 Colo. 586, 589; *Sweet v. Webber*, 7 Colo. 443.

<sup>2</sup> *Gleeson v. Martin White M. Co.*, 13 Nev. 442, 456.

<sup>3</sup> *Donahue v. Meister*, 88 Cal. 121, 131.

<sup>4</sup> *United States v. Castillero*, 2 Black, 17; *Gonu v. Russell*, 3 Mont. 358.

<sup>5</sup> *Gleeson v. Martin White M. Co.*, 13 Nev. 442, 462; *Patterson v. Tarbell* (Ore.), 37 Pac. 76, 78; *Gird v. California Oil Co.*, 60 Fed. 531, 536.

<sup>6</sup> *Pollard v. Shively*, 5 Colo. 309, 317. See, also, *Drumond v. Long*, 9 Colo. 538.

<sup>7</sup> *Newbill v. Thurston*, 65 Cal. 419; *Gregory v. Pershbaker*, 73 Cal. 109; *Pharis v. Muldoon*, 75 Cal. 284. By act passed in this state in 1897, sixty days from date of discovery are allowed for this purpose.

<sup>8</sup> *Patterson v. Tarbell* (Ore.), 37 Pac. 76.

<sup>9</sup> See, *ante*, § 339.

<sup>10</sup> *Newbill v. Thurston*, 65 Cal. 419.



doctrine of the California courts,<sup>1</sup> but follows the rule announced by the supreme courts of Nevada<sup>2</sup> and Idaho,<sup>3</sup> and the manifest intent of the law as suggested by the supreme court of the United States<sup>4</sup> and by the courts of last resort in Colorado<sup>5</sup> and South Dakota.<sup>6</sup> It is unnecessary to here repeat what we have said on this subject in a preceding section.<sup>7</sup> For the reasons therein suggested, we are of the opinion that the rule announced in California is opposed to both the spirit of the law and the weight of authority.

§ 373. **What is sufficient marking under the federal law.**—As noted in the succeeding section, some of the states have enacted laws defining the character of monuments, or marks, to be placed on the ground. In the absence of such state legislation, or local regulation, what constitutes a sufficient marking is a question to be determined by the jury, according to the circumstances in each particular case.<sup>8</sup> It naturally depends upon the conformation of the ground. What might be sufficient in the case of a comparatively level or bare surface might not answer the requirements of the law in a mountainous region where the hills are precipitous or the surface covered with timber or undergrowth.<sup>9</sup>

In this view of the law, adjudicated cases are not often of controlling weight. They depend for their value as precedents upon the reasoning of the courts and the similarity as to facts existing in the case to which they are sought to be applied.

While the commissioner of the general land office has

<sup>1</sup> *Doe v. Waterloo M. Co.*, 70 Fed. 455, affirming 55 Fed. 11.

<sup>2</sup> *Golden Fleece M. Co. v. Cable Cons. M. Co.*, 12 Nev. 312, 329; *Gleeson v. Martin White M. Co.*, 13 Nev. 442.

<sup>3</sup> *Burke v. McDonald*, 2 Idaho, 648.

<sup>4</sup> *Erhardt v. Board*, 113 U. S. 527.

<sup>5</sup> *Murley v. Ennis*, 2 Colo. 300; *Patterson v. Hitchcock*, 3 Colo. 533.

<sup>6</sup> *Marshall v. Harney Peak Tin M. Co.*, 1 S. Dak. 350.

<sup>7</sup> See, *ante*, § 339.

<sup>8</sup> *Taylor v. Middleton*, 67 Cal. 656; *Russell v. Chumasero*, 4 Mont. 309; *Anderson v. Black*, 70 Cal. 226; *Du Prat v. James*, 65 Cal. 555.

<sup>9</sup> *Book v. Justice M. Co.*, 58 Fed. 106, 113.

advised the erection of posts at the corners, and the erection of a signboard at the location point, the law may be satisfied by something less.<sup>1</sup>

We have collated the following examples, wherein the marking in the manner designated was held to satisfy the law:—

In a district where the extent of a claim on each side of the center line is established by local rule, it has been said, that the object of the law is attained by marking this center line; that a man of common intelligence acquainted with the customs of the country, seeing the discovery monument, the preliminary posted notice, and the stakes marking this center line, would be informed by the rules of the district and the laws of the land that the boundaries of the claim were formed by lines parallel to the center line, at the distance prescribed by local rules, and by end lines at right angles thereto. With this knowledge, he could easily trace the boundaries and ascertain exactly where he could locate with safety.<sup>2</sup>

Judge Sawyer held, that the sinking of a discovery shaft, posting a notice thereon, and placing a monument and post at *one* extremity of the linear measurement, was a compliance with the law.<sup>3</sup>

We think these cases stretch the law to the utmost limit of liberality. It is almost a return to the primitive rules, prevalent when the lode was the principal thing located and the surface a mere incident, when the locator could hold but one vein, and his rights as to that vein were not defined by surface boundaries.<sup>4</sup>

Under the existing law, a grant of the surface is sought, and the rights on the discovered lode, as well as all others whose apices may be found therein, are defined exclusively by the form of the location and the direction of the boundary

<sup>1</sup> Gleeson v. Martin White M. Co., 13 Nev. 442, 462.

<sup>2</sup> *Id.* 442, 463. See, also, Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, 449.

<sup>3</sup> North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 311.

<sup>4</sup> See, *ante*, § 58.

lines. Such being the case, it would seem that the posted notice, serving a temporary purpose,<sup>1</sup> constitutes no part of the *marking*, which succeeds its posting. What the existing law evidently contemplates is, physical evidence on the ground of *marks* which will enable one to trace the lines on the surface—not a notice<sup>2</sup> indicating where the locator may place them.

Posted notices may be an aid in determining the *situs* of monuments, but they cannot be substituted for the markings.

In many cases, stakes driven into the ground are the most certain means of identification.<sup>3</sup>

Fencing is not necessary;<sup>4</sup> in fact, where in California the early occupants inclosed their ground with substantial inclosures, it was an open invitation for prospectors to enter, as it indicated a holding for agricultural purposes.

Stakes firmly planted in the ground, marked as corner stakes, with stone mounds placed around them, which stakes and mounds were found by the court to be "prominent and permanent monuments," were held to justify the legal conclusion, that the location was distinctly marked on the ground so that the boundaries could be readily traced.<sup>4</sup>

Stakes and stone monuments at each corner of the claim, and at the center of each of the end lines, is, according to the supreme court of Nevada, as much as has ever been required under the most stringent construction of the law;<sup>5</sup> and yet there are states which require eight posts and monuments, the additional two being placed at the center of the side lines.

A location marked by a discovery monument, on which

<sup>1</sup> See, *ante*, § 350. See, *post*, § 379.

<sup>2</sup> *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291, 299.

<sup>3</sup> *Rogers v. Cooney*, 7 Nev. 215, 219.

<sup>4</sup> *Du Prat v. James*, 65 Cal. 555; *Gird v. California Oil Co.*, 60 Fed. 531, 537; *Book v. Justice M. Co.*, 58 Fed. 106.

<sup>5</sup> *Southern Cross G. & S. M. Co. v. Europa M. Co.*, 15 Nev. 393. See, also, *Souter v. Maguire*, 78 Cal. 543; *Book v. Justice M. Co.*, 58 Fed. 106; *Howeth v. Sullenger*, 113 Cal. 547.

was placed the notice of location, and by a stake at each of three of the corners of the claim, and a monument at the center of each end line, leaving one corner unmarked, was held to be sufficient to comply with the law.<sup>1</sup>

The omission to mark one end of a claim where the ground was so inaccessible that the surveyor when surveying for patent was compelled to determine the position of the end line by triangulation, the remainder of the claim being marked by stakes and mounds at the accessible corners, the center of one end line, a discovery monument and blazed trees on the center line, was held not to be an evasion of the law. Under the circumstances, the marking was sufficient.<sup>2</sup> Posting notices on trees, one at each end of the claim,<sup>3</sup> or posting a notice in the center of the claim without any attempt at marking,<sup>4</sup> is, of course, wholly insufficient. These notices would serve the purpose for which they were originally intended, as notices of intention to locate, but would only preserve the right for a reasonable time to enable the locator to mark his boundaries.

As intimated in a previous section, the marks, stakes, or monuments should be within the statutory limit as to area;<sup>5</sup> yet this rule is to be understood in the light of the doctrine, that excessive locations are not wholly void, but are invalid only as to the excess.<sup>6</sup> They should also be placed upon the public domain, and not upon the property of others; but if within the statutory limit, the placing of such marks on ground previously appropriated will not absolutely vitiate the marking.

In so far as the ground taken is vacant, each location, if properly made in other respects, will be valid.<sup>7</sup>

<sup>1</sup> *Warnock v. De Witt*, 11 Utah, 324.

<sup>2</sup> *Eilers v. Boatman*, 3 Utah, 159; affirmed, 111 U. S. 356.

<sup>3</sup> *Holland v. Mt. Auburn G. Q. M. Co.*, 53 Cal. 149, 151.

<sup>4</sup> *Gelcich v. Moriarity*, 53 Cal. 217; *Morenhaut v. Wilson*, 52 Cal. 263, 269; *Doe v. Waterloo M. Co.*, 70 Fed. 455.

<sup>5</sup> *Leggatt v. Stewart*, 5 Mont. 107, 109; *Hauswirth v. Butcher*, 4 Mont. 299.

<sup>6</sup> See, *ante*, § 362.

<sup>7</sup> *Doe v. Tyler*, 73 Cal. 21; *West Granite Mt. M. Co. v. Granite Mt. M. Co.*, 7 Mont. 356.

The boundary lines of the senior locator, or prior appropriator, will, however, control the rights of the junior, who will ultimately be compelled to rectify his markings so as to respect such boundaries.<sup>1</sup> A failure to comply with the law as to the marking within a reasonable time after discovery, where there is no local rule or state statute fixing the time, or within the time fixed by statute or local rule, renders the ground subject to relocation;<sup>2</sup> or, in case of a relocation, the right of the relocater is lost if he fails to mark his boundaries prior to the resumption of work by the former owner,<sup>3</sup> always assuming that the failure to perfect the location is not caused by the fraud or tortious acts of the relocater.<sup>4</sup> Failure to mark the boundaries within the time allowed by law, or prescribed by state or local regulation, cannot be taken advantage of by a subsequent locator, if the prior locator perfects his location in advance of any intervening rights.<sup>6</sup> A location when perfected relates back to the discovery.<sup>6</sup> Boundaries once established cannot be changed to the detriment of intervening locators.<sup>7</sup>

§ 374. **State statutes defining character of marking.**

—There is no legislation upon the subject of marking the location in either Nevada, Oregon, Washington, or Utah. The following statutory requirements are found in the remaining precious-metal-bearing states and territories:—

*Colorado.*—Before filing the certificate of location for record (within three months after discovery),<sup>a</sup> the surface boundaries must be marked by six posts, hewed or marked on the side, or sides, in toward the claim, and sunk into the

<sup>1</sup> See, *ante*, § 365, p. 476.

<sup>2</sup> *White v. Lee*, 78 Cal. 593; *Funk v. Sterrett*, 59 Cal. 613.

<sup>3</sup> *Gonu v. Russell*, 3 Mont. 358, 363; *Pharis v. Muldoon*, 75 Cal. 284; *Holland v. Ml. Auburn G. Q. M. Co.*, 53 Cal. 149. But see, *post*, § 408.

<sup>4</sup> *Erhardt v. Board*, 113 U. S. 527; *Miller v. Taylor*, 6 Colo. 41.

<sup>5</sup> *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299, 314; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 115. See, *ante*, § 350.

<sup>6</sup> *Doe v. Waterloo M. Co.*, 70 Fed. 457; *Gregory v. Pershbaker*, 73 Cal. 109.

<sup>7</sup> *O'Reilly v. Campbell*, 116 U. S. 418; *Golden Fleece M. Co. v. Cable Cons. M. Co.*, 12 Nev. 312; *Croesus M. & S. Co. v. Colorado L. & M. Co.*, 19 Fed. 78.

<sup>a</sup> *Mills' Annot. Stats.*, § 3150.

ground, one at each corner and one at the center of each side line. If bedrock prevents the sinking of posts, the boundary may be marked by a pile of stones. Where it is impracticable (because of danger in placing or other reason) to place the post at the proper place, it may be placed at the nearest practicable point, suitably marked to designate the proper place.<sup>1</sup>

*California*.—Sixty days after date of discovery is allowed for the purpose of marking, but no method of marking, other than that required by the federal law, is prescribed.<sup>2</sup>

*Idaho*.—Within three days from the date of discovery, the discoverer must mark his boundaries by establishing at each corner thereof, and at any angle in the side lines, a monument of any material or form which will readily give notice, which shall be marked with the name of the claim and the corner, or angle, it represents. If the monument cannot be safely planted at the true angle, or corner, it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner, or angle. If of posts or trees, the monuments must be hewn, and marked upon the side facing discovery, and must be four inches square, or in diameter. All monuments must be four feet high.<sup>3</sup>

*Arizona*.—Before filing location certificate (sixty days after location),<sup>4</sup> the surface boundaries must be marked by eight substantial posts, projecting at least three feet above the surface of the ground, or by substantial stone monuments, at least three feet high, to wit: One at each corner of said claim, and one at the center of each end and side line thereof.<sup>5</sup>

*Montana*.—No time is specified in the Montana laws within which the marking of the location is to be effected. Ninety days are allowed to sink discovery shaft and record the declaratory statement. The inference is plausible, that the locator should be allowed to complete his development

<sup>1</sup> Mills' Annot. Stats., § 3153.

<sup>2</sup> Act of March, 1897.

<sup>3</sup> Rev. Stats., § 3101, as amended. Laws 1895, p. 27, § 2.

<sup>4</sup> Rev. Stats. 1887, § 2349.

<sup>5</sup> Laws 1895, p. 53, §§ 3, 4.



work before marking his boundaries.<sup>1</sup> In any event, he is allowed a reasonable time. The character of the marking is as follows: By marking a tree or rock in place, or by setting a post or stone, at each corner, or angle, of the claim. If a post is used, it must be at least four inches square by four feet six inches in length, set one foot in the ground, with a monument of earth or stone four feet in diameter by two feet in height around the post. If a stone is used, not a rock in place, it must be at least six inches square and eighteen inches in length, set two thirds of its length in the ground, which trees, stakes, or monuments must be so marked as to designate the corners.<sup>2</sup>

*New Mexico.*—No time is provided within which marking is to be effected. In this respect the laws of New Mexico are the same as Montana. Surface boundaries are to be marked by four substantial posts, or four substantial monuments of stone, set at each corner of the claim. Such posts, or monuments, shall each be plainly marked, so as to indicate the direction of the claim from each monument.<sup>3</sup>

*North Dakota.*—Before filing the certificate of location for record (sixty days from date of discovery), the boundaries shall be marked by eight substantial posts, hewed, or blazed, on the side facing the claim, and marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk into the ground as follows: One at the corner, and one at the center of each side line, and one at each end of the lode; but when it is impracticable, on account of rock or precipitous ground, to sink such posts, they may be placed in a monument of stone.<sup>4</sup>

*South Dakota.*—Same as North Dakota.<sup>5</sup>

*Wyoming* —Substantially the same as Colorado.<sup>6</sup>

<sup>1</sup> See, *ante*, § 372.

<sup>2</sup> Rev. Code 1895, § 3611.

<sup>3</sup> Laws 1889, p. 42, § 2.

<sup>4</sup> Rev. Code 1895, §§ 1423, 1430, 1431.

<sup>5</sup> Comp. Laws of Dak. 1887, § 2002. Adopted by South Dakota—Laws of 1890, ch. cv.

<sup>6</sup> Laws 1888, p. 88, § 17.



While the requirements of these several laws should be fulfilled to a reasonable degree, a substantial compliance, where the good faith of the locator is manifest, would undoubtedly be held sufficient. Such statutes are, as a rule, liberally construed. Slight variations should not be permitted to invalidate a location otherwise valid.

§ 375. **Perpetuation of monuments.**—Under the rules and customs governing the rights of tin bounders in Cornwall, bounds were required to be renewed annually, in default of which the estate was subject to re-entry by others.<sup>1</sup>

These bounds, however, were marked, and possession delivered after proceedings had in the stannary courts, the writ of possession being executed by the court bailiff.

The “gales” of the free miner, in the coal and iron mines of the Forest of Dean, were set out and marked by the gaveler of the forest;<sup>2</sup> and among the lead miners of Derbyshire, the “meers” were measured by the barmaster, an agent of the crown, in conjunction with two of the grand jury.<sup>3</sup>

In Mexico, the boundaries were marked, after measurement, by an agent of the mining deputation, who was usually a skilled engineer, and the miner was called upon to enter into an obligation to “keep and observe them forever.”<sup>4</sup>

These methods of establishing boundaries, succeeding, as they did, a formal adjudication as to the right to possession, suggest the propriety of permanency. In the United States, however, we are required to mark our boundaries first, and determine our right to possession afterwards. Even when a survey for patent is made, the deputy mineral surveyor is an agent of the claimant, and his acts in no sense bind the government, and, as we shall observe when dealing with patent proceedings, surveys are made,

<sup>1</sup> See, *ante*, § 5.

<sup>2</sup> See, *ante*, § 7.

<sup>3</sup> See, *ante*, § 8.

<sup>4</sup> See, *ante*, § 13, p. 21.

in the first instance, of the ground *claimed*, regardless of overlapping surfaces or interference with prior surveys or locations. Relative rights arising out of these conflicts are frequently not determined until after long litigation. Therefore, there would be but little use in compelling the erection of indestructible monuments for the purpose of marking the extent of the ground *claimed*. Ordinary prudence will suggest to the locator the advisability of preserving his marks. But the law does not require it. Therefore, it has been held, that where a mining claim is once sufficiently marked on the ground, and all other necessary acts of location are performed, a right vests in the locator, which cannot be divested by the subsequent obliteration of the marks or removal of the stakes without the fault of the locator.<sup>1</sup>

The supreme court of Colorado suggests a sensible exception to this rule: Where there is a variation between the calls of the recorded location certificate and the monuments established on the ground, the locator, in order to avail himself of the rule of law which gives controlling effect to the monuments as they were placed on the ground, must keep up his markings. The reason given in support of this is, that as the erroneous record fails to give constructive notice, if the monuments are swept away, no search, no exercise of prudence, diligence, or intelligence, would advise the subsequent locator of the extent and limits of the prior appropriation,<sup>2</sup> and this is one of the principal objects of marking.

<sup>1</sup> *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw, 96, 110; *Book v. Justice M. Co.*, 58 Fed. 106, 114; *McEvoy v. Hyman*, 25 Fed. 596, 598.

<sup>2</sup> *Pollard v. Shively*, 5 Colo. 309, 318.

ARTICLE VIII. THE LOCATION CERTIFICATE AND ITS CONTENTS.

§ 379. The location certificate — Its purpose.	monuments on the ground.
§ 380. State legislation as to contents of location certificate.	§ 383. "Natural objects" and "permanent monuments."
§ 381. Rules of construction applied.	§ 384. Effect of failure to comply with the law as to contents of certificate.
§ 382. Variation between descriptive calls in certificate and	§ 385. Verification of certificates.

§ 379. **The location certificate — Its purpose.**—In speaking of the "location certificate," we have no reference to the preliminary posted notice of discovery and intention to locate, discussed in a preceding article,<sup>1</sup> except in so far as such posted notice forms the basis of the recorded notice, as it does in the territories of Arizona and New Mexico.<sup>2</sup> In this latter class of cases, the posted notice performs the function of a certificate of location, as it is termed in most states. This certificate is also equivalent in its legal effect to the "declaratory statement" provided for by the laws of Montana.<sup>3</sup>

By the term "certificate of location," we mean the instrument prepared by the locator after the completion of the development work and the marking of his location, which certificate is required by the state laws or local rules to be recorded. This instrument when recorded is a statutory writing affecting realty, being, in the states or localities where it is required, the basis of the miner's "right of exclusive possession" of his mining location granted by the laws of congress.<sup>4</sup> It is the first muniment of his paper title, upon the record of which proceedings for patent are based, and as recorded is intended to impart constructive notice to all subsequent locators of the existence of the claim, its precise locality and extent, as the marking of the location on the ground is intended to

<sup>1</sup> See, *ante*, §§ 350-356.

<sup>2</sup> See, *ante*, § 353.

<sup>3</sup> See, *post*, § 380.

<sup>4</sup> Pollard v. Shively, 5 Colo. 309, 312.

impart actual notice of these facts. The preliminary posted notice performs a temporary function; the recorded certificate a more permanent one. This recorded certificate, notice, or declaratory statement, by whatever name it may be called, is the genesis of the locator's paper title.

The congressional laws do not in terms require any such certificate, but they provide, that where a record of the location is made, such record "shall contain the name "or names of the locators, the date of the location, and such "a description of the claim or claims located, by reference "to some natural object or permanent monument, as will "identify the claim."<sup>1</sup> In the absence of a state law or local rule requiring a record to be made, congress has not undertaken to prescribe the nature of the notices which a miner may be compelled by such laws or rules to *post*, or which he may see fit to post on his own motion. It is only when such notice, or its equivalent, is required to be recorded that the provisions of the federal law become mandatory.<sup>2</sup>

Where state laws or local rules require a record to be made, the recorded instrument must contain at least the elements provided for by the Revised Statutes.<sup>3</sup>

A few of the states provide for a record, but do not prescribe the contents of the notice or certificate to be recorded. In such cases, compliance with the federal law is all that is necessary. Most of the states and territories, however, within the purview of this treatise, have provided by law for the contents of such instruments. Before

<sup>1</sup> Rev. Stats., § 2324.

<sup>2</sup> Gleeson v. Martin White M. Co., 13 Nev. 443, 464; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 86, 112; Ponjade v. Ryan, 21 Nev. 449; Doe v. Waterloo C. M. Co., 55 Fed. 11; Erhardt v. Boaro, 113 U. S. 527.

<sup>3</sup> Brown v. Levan (Idaho), 46 Pac. 661; Drummond v. Long, 9 Colo. 538; Faxon v. Barnard, 4 Fed. 702; Gilpin County M. Co. v. Drake, 8 Colo. 586; Darger v. Le Sieur, 8 Utah, 160; S. C. on rehearing, 9 Utah, 192; Dillon v. Bayless, 11 Mont. 171; Russell v. Chinnasero, 4 Mont. 309; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; Hammer v. Garfield M. & M. Co., 150 U. S. 291; Ponjade v. Ryan, 21 Nev. 449; Gleeson v. Martin White M. Co., 13 Nev. 443.

proceeding with a discussion of the nature of these certificates, it is advisable to present an outline of the state legislation upon the subject.

**§ 380. State legislation as to contents of location certificate:—**

*Colorado.*—The location certificate must contain: (1) name of the lode; (2) name of locator; (3) date of location; (4) number of feet in length claimed on each side of the center of discovery shaft; (5) the general course of the lode;<sup>1</sup> (6) a description of the claim sufficient to identify it.<sup>2</sup>

*California.*—By an act passed March 1897, a preliminary notice is required to be posted and recorded within twenty days from the date of discovery, and within sixty days from such discovery a final certificate of location must be recorded in the county recorder's office. Such certificate shall state: (1) the name of the lode or claim; (2) the name of the locator, or locators; (3) the date of discovery and posting of the preliminary notice, which is deemed the date of location; (4) a description of the claim, defining the exterior boundaries as they are marked upon the ground, and such additional description by reference to some natural objects or permanent monument as will identify the claim; (5) a statement that it is the final or completed notice of location, and that the development work required by the act has been done. The certificate must be dated, signed, and verified by oath of the locator, or some one in his behalf.<sup>3</sup>

*Idaho.*—The laws of Idaho provide for two notices: one preliminary, to be posted only; the other a final one, to be both posted and recorded.<sup>4</sup> The final notice must contain: (1) name of lode; (2) name of locator; (3) date of discovery; (4) direction and distance claimed along the ledge from the discovery; (5) distance claimed on each side of the middle of the ledge; (6) distance and direction from

<sup>1</sup> Mills' Annot. Stats., § 3150.

<sup>2</sup> *Id.*, § 3151.

<sup>3</sup> For full text of the act, see appendix.

<sup>4</sup> See, *ante*, § 354.

discovery monument to some natural object by which the claim may be identified; (7) name of mining district, county, and state.<sup>1</sup>

*Arizona.*—The notice or certificate of location must contain: (1) name of the claim; (2) name of locator; (3) date of location; (4) number of feet in length, and number of feet claimed on each side of discovery shaft lengthwise of the claim; (5) general course of the lode; (6) the locality of the claim with reference to some natural object or permanent monument as will identify the claim.<sup>2</sup>

*Montana.*—The instrument which is to be recorded is called the "declaratory statement." It must contain: (1) name of lode or claim; (2) name of locator; (3) date of location, and such a description with reference to natural objects or permanent monuments as will readily identify the claim; (4) the number of linear feet claimed along the course of the vein each way from point of discovery, with the width on each side of the center of the vein, and the general course of the vein as near as may be; (5) dimensions and location of discovery shaft, or its equivalent, sunk upon the lode; (6) location and description of each corner, with the markings thereon. The declaratory statement must be verified by the oath of a locator, or one of the locators, and, in case of a corporation, by a duly authorized officer.<sup>3</sup>

*Nevada.*—There is no legislation on the subject in Nevada.

*New Mexico.*—A copy of the posted notice is required to be recorded. This must contain: (1) the names of the locators; (2) the intent to locate the claim; (3) a description by reference to some natural object or permanent monument.<sup>4</sup>

<sup>1</sup> Laws 1895, p. 25, §§ 2, 4.

<sup>2</sup> Laws 1895, p. 53, § 1.

<sup>3</sup> Rev. Code 1895, § 3612.

<sup>4</sup> Comp. Laws 1884, § 1565. See, *ante*, § 353.

*North Dakota.*—The location certificate must contain: (1) name of lode; (2) name of locator; (3) date of location; (4) number of feet in length claimed on each side of the discovery shaft; (5) number of feet in width claimed on each side of lode; (6) general course of lode as near as may be;<sup>1</sup> (7) such a description as shall identify the claim with reasonable certainty.<sup>2</sup>

*Oregon.*—No provision is made as to the contents of a notice, other than that it shall contain a description of the claim “as near as may be.” Continuous working dispenses with the necessity of a record.<sup>3</sup>

*South Dakota.*—The requirements as to certificate of location are the same as in North Dakota.<sup>4</sup>

*Washington.*—While a record is contemplated,<sup>5</sup> no formal certificate is required.

*Wyoming.*—The certificate must contain: (1) name of the lode; (2) name of the locator or locators; (3) date of location; (4) length of claim along the vein, measured from center of discovery shaft, and general course of the vein as far as known; (5) amount of surface ground claimed on either side of the center of the discovery shaft or workings; (6) a description of the claim by such designation of natural or fixed objects as shall identify the claim beyond question.<sup>6</sup>

**§ 381. Rules of construction applied.**—In the initiation of rights upon public mineral lands, as well as in the various steps taken by the miner to perfect his location, his proceedings are to be regarded with indulgence, and the notices required invariably receive at the hands of the courts a liberal construction.<sup>7</sup>

<sup>1</sup> Rev. Code 1895, § 1428.

<sup>2</sup> Rev. Code 1893, § 1429.

<sup>3</sup> Hill's Annot. Stats., § 3828.

<sup>4</sup> Comp. Laws 1887, §§ 1999, 2000. Adopted by South Dakota—Laws 1890, ch. cv., § 1.

<sup>5</sup> Hill's Annot. Stats., § 2214.

<sup>6</sup> Session Laws 1890-91, ch. xlv., pp. 179-180.

<sup>7</sup> *Carter v. Bacigalupi*, 83 Cal. 187; *Prince of Wales Lode*, 2 Copp's L.O. 2, 3.



To hold him to absolute technical strictness in all the minor details, would be practically to defeat the manifest end and object of the law. The pioneer prospector, as a rule, is neither a lawyer nor a surveyor. Neither mathematical precision as to measurement, nor technical accuracy of expression in the preparation of notices, is either contemplated or required.<sup>1</sup> The law, being designed for the encouragement and benefit of the miners, should be liberally interpreted, "looking to substance, rather than shadow, "and should be administered on the lines of obvious common sense."<sup>2</sup> Mere imperfections in the certificate will not render it void.<sup>3</sup> In matters of description, calls that are erroneous will not destroy the validity of the notice or certificate, if by excluding them a sufficient description remain to enable its application to be ascertained.<sup>4</sup>

Thus, where a certificate of a location specified its *situs* as being in the wrong county, it being otherwise valid, and having been recorded in the right county, the erroneous statement was mere surplusage, and as such was rejected.<sup>5</sup>

In the absence of a local requirement to that effect, the certificate need not state either the district, county, or state in which the location is situated.<sup>6</sup>

A mistake in the certificate as to the direction and course, such as "northerly" instead of "northeasterly," the description being aided by monuments on the ground, is of no moment.<sup>7</sup>

The certificate is not required to show the precise boundaries of the claim as marked on the ground, but it is sufficient if it contains directions, which, taken in connection with such boundaries, will enable a person of reasonable intelligence to find the claim and trace the lines.<sup>8</sup>

<sup>1</sup> *Book v. Justice M. Co.*, 58 Fed. 106, 115.

<sup>2</sup> *Cheesman v. Hart*, 42 Fed. 98, 99.

<sup>3</sup> *Bennett v. Harkrader*, 158 U. S. 441, 443.

<sup>4</sup> *Duryea v. Boucher*, 67 Cal. 141.

<sup>5</sup> *Metcalf v. Prescott*, 10 Mont. 283.

<sup>6</sup> *Carter v. Bacigalupi*, 83 Cal. 187.

<sup>7</sup> *Book v. Justice M. Co.*, 58 Fed. 106, 115.

<sup>8</sup> *Gamer v. Glenn*, 8 Mont. 371, *Upton v. Larkin*, 7 Mont. 449; *Flavin v. Mattingly*, 8 Mont. 242; *Brady v. Husby*, 21 Nev. 433.

§ 382. **Variation between calls in certificate and monuments on the ground.**—When it is once conceded that a recorded certificate of location is a statutory instrument affecting real property,<sup>1</sup> it follows, that general rules regarding descriptive calls in this class of instruments apply with equal force to the construction of such certificates.

Mr. Washburn states the general rule to be, that courses and distances are generally regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to monuments and boundaries that are referred to as indicating and identifying the land.<sup>2</sup>

This doctrine has been uniformly applied by the courts to certificates of location of mining claims.<sup>3</sup>

The general rule applicable to patents, deeds, and other instruments of conveyance, that where a monument is referred to in a descriptive call, and it has been obliterated or destroyed, parol evidence may be introduced to show where it was actually located in the field, does not, it seems, apply to certificates of location. As heretofore indicated, in order to invoke the rule, that courses and distance yield to monuments, these monuments must be actually existing, and parol evidence is inadmissible to point out where they were originally placed.<sup>4</sup> The reason for this rule has been fully explained in a preceding section.<sup>5</sup>

§ 383. **“Natural objects” and “permanent monuments.”**—The words “natural objects” and “permanent monuments” are general terms, susceptible of different shades of meaning, depending largely upon their application. What might be regarded as a permanent monument for one purpose, might not be so considered with reference

<sup>1</sup> See, *ante*, § 379.

<sup>2</sup> 3 Washburn on Real Property, 3d ed., p. 348; 2 Devlin on Deeds, § 1029.

<sup>3</sup> Pollard v. Shively, 5 Colo. 309, 313; Book v. Justice M. Co., 58 Fed. 106, 115; Hoffman v. Beecher, 12 Mont. 489; Cullacott v. Cash G. S. M. Co., 8 Colo. 179; McEvoy v. Hyman, 25 Fed. 596, 599.

<sup>4</sup> Pollard v. Shively, 5 Colo. 309, 318.

<sup>5</sup> See, *ante*, § 375, p. 489.

to a different purpose. The same rule applies to natural objects.<sup>1</sup> There is no particular necessity for drawing a distinction between "natural objects," such as streams, rivers, ponds, highways, trees, and other things, *ejusdem generis*, and "permanent monuments," which may imply an element of artificial construction, it being the manifest intent of the law that any object of a fairly permanent character, whether natural or artificial, may, if sufficiently prominent, serve for the purpose of reference and identification.

As to whether a given notice or certificate of location contains such a description of the claim as located by reference to some natural object or permanent monument as will identify it, is a question of fact to be determined by the jury,<sup>2</sup> and parol evidence is admissible for the purpose of proving that the thing named in the certificate is, in fact, a natural object or permanent monument.<sup>3</sup> In the absence of evidence for, or against, the sufficiency of the reference in the notice, it will be presumed to be sufficient to identify the claim.<sup>4</sup>

The following cases indicate the views of the courts as to what are natural objects or permanent monuments:—

Prominent posts, or stakes, firmly planted in the ground;<sup>5</sup> stones, if of proper size and properly marked;<sup>6</sup> monuments,<sup>7</sup> prospect holes,<sup>8</sup> and shafts,<sup>9</sup> may be sufficient

<sup>1</sup> *Quinby v. Boyd*, 8 Colo. 194.

<sup>2</sup> *Eilers v. Bostman*, 111 U. S. 356; *Gamer v. Glenn*, 8 Mont. 371; *Brady v. Husby*, 21 Nev. 453; *Flavin v. Mattingly*, 8 Mont. 242; *Metcalf v. Prescott*, 10 Mont. 283; *Russell v. Chumazero*, 4 Mont. 309.

<sup>3</sup> *Carter v. Baigaiupi*, 83 Cal. 187; *O'Donnell v. Glenn*, 8 Mont. 248; *Flavin v. Mattingly*, 8 Mont. 242; *Metcalf v. Prescott*, 10 Mont. 283; *Dillon v. Bayliss*, 11 Mont. 171; *Kelly v. Taylor*, 23 Cal. 14; *Prince of Wales Lode*, 2 Copp's L. O. 2, 3.

<sup>4</sup> *Brady v. Husby*, 21 Nev. 453; *Gleeson v. Martin White M. Co.*, 13 Nev. 442; *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291, 299.

<sup>5</sup> *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 112; *Russell v. Chumazero*, 4 Mont. 309; *O'Donnell v. Glenn*, 8 Mont. 248; *Hanson v. Fletcher (Utah)*, 37 Pac. 480.

<sup>6</sup> *Russell v. Chumazero*, 4 Mont. 309; *Gamer v. Glenn*, 8 Mont. 371.

<sup>7</sup> *Hanson v. Fletcher (Utah)*, 37 Pac. 480.

<sup>8</sup> *Id.*

<sup>9</sup> *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 111; *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 299, 312.

as permanent monuments within the meaning of the law. The boundary lines of adjoining claims have uniformly been held to be such.<sup>1</sup> A tree is a fixed natural object, and when marked artificially or naturally, there is less room to question its sufficiency than in the case of a shaft.<sup>2</sup> A cañon, or any other prominent feature of the landscape, is a natural object.<sup>3</sup>

**§ 384. Effect of failure to comply with the law as to contents of certificate.**—It follows from what we have heretofore said, that any notice or certificate of location which is used as the basis of the record, which fails to reasonably comply with the requirements of the federal law as to the contents of such record, is ineffectual and void. As to the omission of any of the other elements required by state legislation, in some of the states the law itself prescribes the penalty by providing that the failure to insert any of the requirements renders the location void. This is the rule in California, Colorado, Arizona, North and South Dakota. The laws of the other states and territories are silent upon the subject.

If the rules applicable to local regulations and customs<sup>4</sup> may be properly invoked in the case of statutory enactments—that is, that a forfeiture is not worked unless the custom or local rule in terms so declares—the provisions of the statutes in the last class of states, exacting requirements in excess of those made essential by the federal law, are merely directory, and their omission is accompanied with no serious consequences. We do not see why such rule should not be applicable alike to local and statutory regulations. As to the other states, where legislation of the

<sup>1</sup> *Upton v. Larkin*, 7 Mont. 449; *Russell v. Chumaseero*, 4 Mont. 309; *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291; *Metcalf v. Prescott*, 10 Mont. 283; *Book v. Justice M. Co.*, 58 Fed. 106; *Southern Cross M. Co. v. Europa M. Co.*, 15 Nev. 383; *Gamer v. Glenn*, 20 Pac. 658; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 41. *Contra*: *Baxter Mt. G. M. Co. v. Patterson*, 3 New Mex. 179.

<sup>2</sup> *Quinby v. Boyd*, 6 Pac. 462.

<sup>3</sup> *Flavin v. Mattingly*, 8 Mont. 242.

<sup>4</sup> See, *ante*, § 274.

character noted is found, it may be said, that forfeitures are not favored by the courts, and where a location is made in good faith, and all the essential requirements are complied with, instances are not frequent where the miner is deprived of substantial rights for failure to strictly comply with the letter of the law.

§ 385. **Verification of certificates.**—Three of the states, California,<sup>1</sup> Idaho, and Montana, require the certificate of location, or declaratory statement, to be verified by the oath of a locator. In a preceding section<sup>2</sup> we have suggested that these provisions may be repugnant to the federal law, as imposing unnecessary and onerous burdens upon locators. We have there shown, that the supreme court of Montana, after doubting the validity of the provision, has upheld its validity. We are not aware of any ruling on the subject in Idaho. Where the law makes notices of this character *prima facie* evidence of the facts therein recited, it would seem that the formality of an oath is not an unreasonable requirement. In many states, instruments affecting title to real property are required to be verified before they are entitled to record, and all states require some form of acknowledgment to such class of documents. We do not see upon principle, why the law, as found in California, Montana, and Idaho, should not be upheld.

#### ARTICLE IX. THE RECORD.

§ 389. Time and place of record.

§ 391. Proof of record.

§ 390. Effect of failure to record  
within the time limited.

§ 392. The record as evidence.

§ 389. **Time and place of record.**—As heretofore frequently indicated,<sup>2</sup> in the absence of a state law or local rule requiring it, there is no necessity for recording any notice or certificate in connection with the acquisition of title to public mineral lands by location.

<sup>1</sup> Act of March, 1897.

<sup>2</sup> See, *ante*, §§ 278, 328.

<sup>3</sup> See, *ante*, § 251.

But as observed in a preceding section,<sup>1</sup> the popular notion is, that notices of location should be recorded somewhere, and although in the absence of a law or rule so declaring, a failure to record is not accompanied with any loss of right, yet the universal rule is, to file the notice of location with the county officer charged by the state or territorial laws with the duty of registering instruments affecting title to real estate.

Where the law or regulation requires a record to be made, but does not specify the time within which it is to be effected, we think a reasonable time should be allowed, following the rule heretofore announced as to the time of performance of other acts of location.<sup>2</sup> What constitutes a reasonable time depends upon the circumstances surrounding each particular case, such as the distance from the discovered mine to the place of record, and the means of communication between the two points. For the most part, the states and territories wherein laws exist requiring a record to be made, provide for the time within which the notice or certificate is to be lodged with the recording officer. Colorado,<sup>3</sup> allows ninety days; California,<sup>4</sup> North Dakota,<sup>5</sup> and South Dakota,<sup>6</sup> sixty days, computed from date of discovery; Idaho,<sup>7</sup> ninety, and Arizona, sixty days from date of *location*;<sup>8</sup> Montana<sup>9</sup> and New Mexico,<sup>10</sup> ninety, and Oregon,<sup>11</sup> thirty days from posting the preliminary notice referred to in a preceding article.<sup>12</sup> In Wyoming, if the discovered claim is within an organized district, two

<sup>1</sup> See, *ante*, § 273.

<sup>2</sup> See, *ante*, § 339.

<sup>3</sup> Mills' Annot. Stats., § 3150.

<sup>4</sup> Act of March, 1897.

<sup>5</sup> Rev. Code 1895, § 1428.

<sup>6</sup> Comp. Laws Dak. 1887, §§ 1999, 2000. Adopted by South Dak.—Laws 1890, § 1.

<sup>7</sup> Laws 1895, p. 25, § 4.

<sup>8</sup> Rev. Stats. 1887, § 2349. Laws 1895, p. 53, § 2.

<sup>9</sup> Rev. Code 1895, § 3612.

<sup>10</sup> Comp. Laws 1884, § 1566.

<sup>11</sup> Hill's Annot. Stats. 1892, §§ 3828, 3831.

<sup>12</sup> See, *ante*, §§ 350-353.



records are required—one with the district recorder, within ninety, the other with the county clerk, within one hundred and twenty days from the date of discovery.

Washington authorizes the election of recorders by mining districts, but its laws are silent, both as to contents of the notice and the time within which it is to be recorded.

Nevada provides for the recording of the original with the district recorder, and a duplicate with the county recorder.<sup>1</sup>

Until the passage of a recent act by the legislature of California, it was customary in that state to record in the county recorder's office, as well as with the district recorder, if there were one. In the absence of a written district rule, a custom as to place of record might be shown. But such custom, to be binding, ought to be so well known, understood, and recognized in the district, that locators should have no reasonable ground for doubt as to what was required as to place of record.<sup>2</sup> But the subject of recording is now regulated by statute. Recording in districts is now prohibited.<sup>3</sup>

**§ 390. Effect of failure to record within the time limited**—The mere failure to record a notice, certificate, or declaratory statement, within the statutory time does not render the location of the claim invalid, where there are no intervening rights before the record is properly made, if there has been full compliance with the law in all other respects.<sup>4</sup>

This is but the reiteration of a principle announced in a previous section,<sup>5</sup> that the failure to comply with any of the requirements of the law within the time limited *may* subject the ground to relocation; that the locator delays the performance of these acts at his peril; but if he complies

<sup>1</sup> Stats. 1885, p. 27, § 1.

<sup>2</sup> See, *ante*, § 273.

<sup>3</sup> Act of March, 1897.

<sup>4</sup> *Preston v. Hunter*, 67 Fed. 996, 999; *Faxon v. Barnard*, 4 Fed. 702, 703; *Strepey v. Stark*, 7 Colo. 614; *Craig v. Thompson*, 10 Colo. 517.

<sup>5</sup> See, *ante*, § 340.



with the law prior to the acquisition of any right by a subsequent locator, no one has a right to complain. The acts when completed will relate back to the inception of the right. Where, however, the requirement as to recording is fixed by local rule, the failure to record will not work forfeiture unless the rule itself so provides.<sup>1</sup>

§ 391. **Proof of record.**—Where a state law or local rule requires the certificate to be recorded with a county officer whose duties are defined by statute, such as recorder, clerk, or register of deeds, the record will prove itself, and as a rule, certified copies thereof are admissible in evidence with like effect as the original. But in case of records in the mining districts, the rule is different. Such records do not prove themselves. They must be produced by the proper officer, whose official character must be shown, and the authenticity of such records must be established.<sup>2</sup> Certified copies of such records cannot be admitted in evidence, unless it be first shown that their custodian was empowered under the local rules to give and authenticate such copies.<sup>3</sup>

§ 392. **The record as evidence.**—Constructive notice by recording is wholly a creature of the statute. A record not provided for by statute or recognized by law gives no notice. Therefore, before a record of a mining location can be introduced in evidence for any purpose, it must appear that it is authorized by law; otherwise, it is irrelevant and inadmissible.<sup>4</sup>

Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein,<sup>5</sup> provided they are sufficiently stated.<sup>6</sup> A record

<sup>1</sup> See, *ante*, § 274.

<sup>2</sup> *Roberts v. Wilson*, 1 Utah, 292.

<sup>3</sup> *Harvey v. Ryan*, 42 Cal. 626; *Roberts v. Wilson*, 1 Utah, 292. See, *ante*, § 272. See, also, *Atwood v. Fricot*, 17 Cal. 37.

<sup>4</sup> *Moxon v. Wilkinson*, 2 Mont. 421; *Golden Fleece M. Co. v. Cable Cons. M. Co.*, 12 Nev. 312; *Chamberlain v. Bell*, 7 Cal. 292; *Mesick v. Sunderland*, 6 Cal. 298, 315; 1 Wharton on Evidence, 3d ed., § 643.

<sup>5</sup> 2 Jones on Evidence, § 521.

<sup>6</sup> *Strepey v. Stark*, 7 Colo. 614; *Jantzen v. Arizona C. Co. (Ariz.)*, 20 Pac. 93.

of a certificate of a location which recites the citizenship of locators, the fact of discovery, and the fact that the location had been marked upon the ground so that the boundaries could be readily traced, is not evidence of any of these facts<sup>1</sup> in any of the states or territories, for the simple reason, that no such facts are required to be stated in any of the statutory notices.

Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, the last step in perfecting the location.<sup>2</sup>

While many of the states require the date of the discovery to be stated in the recorded certificate, we do not think that this would be evidence of the *fact* of discovery. A discovery once proven, such a record would, *prima facie*, fix the date. The question of discovery is the most important of all the acts required in the proceedings culminating in a perfected location. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three states (California, Idaho, and Montana), the certificate is executed with no solemnity. It is not either acknowledged or sworn to. It is a mere *ex parte* declaration in his own behalf of the party most interested.<sup>3</sup> The same may be said of marking the boundaries.

It is quite true, that when a certificate contains a

<sup>1</sup> Flick v. Gold Hill & L. M. Co., 8 Mont. 298.

<sup>2</sup> Strepey v. Stark, 7 Colo. 614, 619.

<sup>3</sup> Judge Phillips, in his charge to the jury in Cheesman v. Shreeve, 40 Fed. 787, said, that certificates of location are presumptive evidence of discovery. But in this case, many years elapsed between the original location and the litigation, and the fact of discovery was supported by the testimony of the parties. Under these circumstances the judge held, that every reasonable presumption should be indulged in favor of the integrity of the location. The reasoning, while persuasive so far as this case is concerned, does not militate against the views announced in the text.

description of the claim with reference to a natural object or permanent monument, the recorded notice to this extent may be *prima facie* evidence of its own sufficiency, for the reason, that the statute requires such description to be inserted in the certificate.

The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent. When the locator's right is challenged, he should be compelled to establish by proof outside of the certificate all the essential facts, without the existence of which the certificate possesses no potential validity. These facts once proven, the recorded certificate may be considered as *prima facie* evidence of such other facts as are required to be stated therein.

## ARTICLE X. CHANGE OF BOUNDARIES AND AMENDED LOCATION CERTIFICATES.

§ 396. Circumstances justifying change of boundaries.	dependent of state legislation.
§ 397. Privilege of changing boundaries exists in the absence of intervening rights, in-	§ 398. Objects and functions of amended certificates.

**§ 396. Circumstances justifying change of boundaries.**—The difficulties surrounding the locator in determining the precise position of his discovered vein in the earth, the probable course of its apex, and in many instances its width, frequently render it impossible for him to so mark his boundaries within the time allowed by law for that purpose, as to entitle him to the full measure of property rights which the law permits him to acquire as the reward for his discovery. It frequently happens, that the limited extent of surface exploration possible within the periods allowed him does not develop the true conditions. His markings, therefore, are frequently based on erroneous suppositions and wrong theories. While the government is not concerned with the particular individual who is the

recipient of its bounty, and it makes but little difference to it who discovers and develops its mineral resources, its policy is to encourage the search for, and the opening of, mines, and this policy is best subserved by permitting the discoverer to rectify and readjust his lines whenever he may do so without impairing the intervening rights of others.

While the locator marks his boundaries in every instance at his peril, there is no reason why he should be compelled to abide by first impressions, if no one is injured by a subsequent rectification of his boundaries.

It also frequently happens, that at the time a discovery is made, the existence of contiguous prior locations prevents him from giving to his surface that symmetrical form which the law contemplates; or if he makes it in the ideal form, a surface conflict arises, rendering the extent of his rights vague and uncertain. These prior locations are frequently abandoned, and the ground embraced therein becomes subject to reappropriation. As heretofore suggested, when such abandonment or forfeiture becomes effectual, the conflict area does not inure to the advantage of the junior locator.<sup>1</sup> But the courts uphold the right of the junior under such circumstances to re-form his lines and amend his location so as to include the overlapping surface.<sup>2</sup> Where an application for patent is made, and a survey for that purpose is ordered, the deputy mineral surveyor is controlled by the record of the certificate of location, where one is required,<sup>3</sup> and the markings on the ground, the latter controlling where there is a variation between the descriptive calls of the record and the monuments.<sup>4</sup> While, for the purpose of obtaining parallelism,<sup>5</sup> the lines may be drawn in, so that, as finally surveyed, the

<sup>1</sup> See, *ante*, § 363.

<sup>2</sup> See, *ante*, § 363.

<sup>3</sup> *Lincoln Placer*, 7 L. D. 81; *Rose Lode Claims*, 22 L. D. 83; *Com'rs' Letter* — 1 Copp's L. O. 12.

<sup>4</sup> See, *ante*, § 382.

<sup>5</sup> *Doe v. Sanger*, 83 Cal. 203, 214; *Doe v. Waterion M. Co.*, 54 Fed. 935, 940; *Tyler v. Sweeney*, *Id.* 284; *Last Chance M. Co. v. Tyler*, 61 Fed. 557; *Philadelphia M. Claim v. Pride of the West*, 3 Copp's L. O. 82.

boundaries are approximately within the limits of the surface area as originally claimed, yet no authority is given to extend the surveyed boundaries so as to include area which at the time of the survey is not within the ground actually claimed, or found to be, at least, approximately within the lines connecting the monuments as marked, prior to the order for survey.

It is therefore frequently found necessary to change boundaries before applying for an order for survey; and when so changed, an amended location is made, and an amended certificate is prepared and recorded, which, if free from conflicts with prior locators, or those whose rights have supervened since the perfection of the original location, is just as valid as if made in the original instance.

Those locating subsequently to the perfection of the amended location are not injured, and have no right to complain.<sup>1</sup>

**§ 397. Privilege of changing boundaries exists, in the absence of intervening rights, independent of state legislation.**—In some of the states and territories, amended locations and certificates are the subject of statutory regulation. This is the case in Colorado,<sup>2</sup> Idaho,<sup>3</sup> Arizona,<sup>4</sup> New Mexico,<sup>5</sup> North Dakota,<sup>6</sup> South Dakota,<sup>7</sup> and Wyoming.<sup>8</sup>

The provisions in all these states are on parallel lines with those of Colorado, which are as follows:—

“ If, at any time, the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was erroneous, defective, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface

<sup>1</sup> Gleeson v. Martin White M. Co., 13 Nev. 442.

<sup>2</sup> Mills' Annot. Stats., § 3160.

<sup>3</sup> Laws 1895, p. 27, § 5.

<sup>4</sup> *Id.*, p. 54, § 7.

<sup>5</sup> Laws 1889, p. 42, § 4.

<sup>6</sup> Rev. Code 1895, § 1437.

<sup>7</sup> Comp. Laws Dak. 1887, § 2008. Adopted by South Dak.—Laws 1890, ch. cv.

<sup>8</sup> Laws 1888, p. 85, § 17.

"boundaries, or taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act; *provided*, that such relocation does not interfere with existing rights of others at the time of such relocation, and no such relocation, or other record thereof, shall preclude the claimant, or claimants, from proving any such title, or titles, as he, or they, may have held under previous location."

But in the nature of things, this right exists throughout the mining regions, independent of statutory regulations. The supreme court of California, a state which has no legislation on the subject, has held, that if locators have any apprehension as to the sufficiency of their original location, there is no reason why they should not be permitted to modify or amend it.<sup>1</sup>

Of course, the alteration of boundaries, by taking in new territory and filing amended certificates where the antecedent one is absolutely void, cannot be permitted to the prejudice of intervening rights.<sup>2</sup> But with this qualification, the right to change boundaries and rectify lines exists throughout the mining regions.

In dealing with this subject in the future, we shall assume the correctness of this theory, and, therefore, that the decisions of the courts in states where laws of this character exist, so far as underlying principles are discussed therein, may be resorted to as precedents in states where legislation on the subject is wanting. We think the circumstances set forth in the preceding section justify this assumption.

#### § 398. Objects and functions of amended certificates.

— Where a change of boundaries is sought, the acts necessary to accomplish the desired result are specified by statute

<sup>1</sup> *Thompson v. Spray*, 72 Cal. 528, 529.

<sup>2</sup> *Seymour v. Fisher*, 18 Colo. 188; *Omar v. Soper*, 11 Colo. 380; *Hall v. Arnott*, 80 Cal. 348; *Tombstone Townsite Cases*, 15 Pac. 26; *Wight v. Tabor*, 2 L. D. 738.

in the states enumerated in the preceding section. Where there is no statute, in re-marking of the boundaries and preparing and recording the certificate the same formalities should be observed as in the case of an original location.

In speaking of the objects and functions of additional or amended certificates of location, the supreme court of Colorado thus states its views:—

“The evident intent of the statute is, that the additional certificate shall operate to cure defects in the original, and thereby to put the locator, where no other rights have intervened, in the same position that he would have occupied if no such defect had occurred. Such intent is in accord with the principle of all curative provisions of law.”<sup>1</sup>

Such a certificate may be used as evidence, although the original may be incomplete or imperfect, upon the theory, that the amended certificate relates back to a *right* of location accruing by virtue of the prerequisite discovery and an attempted compliance with the law.<sup>2</sup>

A distinction is drawn between cases where the original certificate is absolutely void, or where the amended certificate seeks to appropriate new and additional ground, and one where the original is simply defective. In the former class of cases, a proper relocation or intervening appropriation cuts off the right of amendment. In the latter, where the object is to simply cure imperfections and obvious defects, the amended certificate will relate back to the original in spite of intervening locations.<sup>3</sup> This is equivalent to the doctrine, that mere imperfections in location certificates do not render them void so as to make the ground subject to relocation. Where new territory is added by amendment, it cannot be said, that as to such addition the rights relate back to the original location. That is not the intent of the law. As to such new territory, the amended certificate

<sup>1</sup> *Strepey v. Stark*, 7 Colo. 614, 620.

<sup>2</sup> *McGinnis v. Egbert*, 8 Colo. 41, 45; *Moyle v. Bullene*, 7 Colo. App. 308; *Becker v. Pugh*, 9 Colo. 589.

<sup>3</sup> *McEvoy v. Hyman*, 25 Fed. 596; *Tombstone Townsite Cases (Ariz.)*, 15 Pac. 26; *Hall v. Arnott*, 80 Cal. 348.



would operate only from the time the relocation is perfected. Said Judge Hallett:—

"Everyone who is at all familiar with mining locations knows, that in practice the first record must usually, if not always, be imperfect. Recognizing these difficulties, it has never been the policy of the law to avoid a location for defects in the record, but rather to give the locator an opportunity to correct his record, whenever defects may be found in it. . . . This is the function and proper office of amendments: To put the original in as perfect condition as if it had been complete in the first instance."<sup>1</sup>

In other words, a reasonable latitude of amendment is allowed, of which the locator cannot be deprived because some one has attempted to relocate his ground.

There is a distinction between amending an original location by re-forming lines and rectifying errors based upon a prior discovery and location, and the relocation of abandoned ground. The former, if properly made, and no other rights have intervened, takes effect, subject to the qualification heretofore stated, by relation, as of the date of the original; whereas, relocation of abandoned ground becomes operative only from the date of its perfection;<sup>2</sup> and whether a given certificate is a mere amendment or a relocation of abandoned ground, will depend upon the facts as they exist, and not upon the recitals of the certificate.<sup>3</sup> The second, or amended notice, is not an abandonment of the original.<sup>4</sup> An amended notice cannot, by the mere omission to insert names of the original locators, divest the title acquired by the original location,<sup>5</sup> unless done with their knowledge and consent.<sup>6</sup>

<sup>1</sup> *McEvoy v. Hyman*, 25 Fed. 596, 600. See, also, *Craig v. Thompson*, 10 Colo. 517.

<sup>2</sup> *Cheesman v. Shreeve*, 40 Fed. 787, 789.

<sup>3</sup> *Id.*

<sup>4</sup> *Thompson v. Spray*, 72 Cal. 528; *Weill v. Lucerne M. Co.*, 11 Nev. 200, 213.

<sup>5</sup> *Thompson v. Spray*, 72 Cal. 528; *Hallack v. Traber* (Colo.), 48 Pac. 110; *Mono M. Co. v. Magnolia E. & W. Co.*, 2 Copp's L. O. 68.

<sup>6</sup> *Morton v. Solambo* (C. M. Co.), 26 Cal. 527; *Gore v. McBrayer*, 18 Cal. 583; *Moore v. Hainerstag*, 109 Cal. 122, 125.

Additional territory embraced within an amended location made by one co-tenant will inure to the benefit of all, on the principle, that the right to change the boundaries arises out of, and relates back to, the original location.<sup>1</sup>

Where the second, or amended, notice contains names other than those set forth in the original, in an action against strangers this fact cannot be taken advantage of. It may be treated as an original notice as to the persons whose names do not appear on the first, and as a supplemental, or amended notice, as to those whose names appear on both.<sup>2</sup>

Any radical change of the name of a claim might be construed as an attempt to hide its identity, and mislead adverse claimants in patent proceedings;<sup>3</sup> but the mere dropping of a descriptive prefix — as, for instance, naming a claim the “Tiger” instead of the “Little Tiger,” “Shields” in place of “General Shields,” or “Flag” instead of “American Flag,” — where the other descriptive portions of the notice are regular, is of no importance.<sup>4</sup>

It is not necessary that the purposes for which a certificate is amended should be specified. The filing of such certificate, if made under proper conditions, is effectual for all the purposes enumerated in the statute, whether such purposes are mentioned in the certificate or not.<sup>5</sup>

<sup>1</sup> *Hallack v. Traber* (Colo.), 46 Pac. 110.

<sup>2</sup> *Thompson v. Spray*, 72 Cal. 528, 529.

<sup>3</sup> *Morr. Min. Rights*, 8th ed., p. 89.

<sup>4</sup> *Seymour v. Fisher*, 16 Colo. 188, 199.

<sup>5</sup> *Johnson v. Young*, 18 Colo. 625, 629.

## ARTICLE XI. RELOCATION OF FORFEITED OR ABANDONED CLAIMS.

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| § 402. Circumstances under which relocation may be made.<br>§ 403. New discovery not essential as basis of relocation.<br>§ 404. Relocation admits the validity of the original.<br>§ 405. Relocation by original locator.<br>§ 406. Relocation by one of several original locators in hostility to the others. | § 407. Relocation by agent or others occupying contractual or fiduciary relations with original locator.<br>§ 408. Manner of perfecting relocations—Statutory regulations.<br>§ 409. Right of second locator to improvements made by the first. |
|---|---|

**§ 402. Circumstances under which relocations may be made.**—For a failure to perform labor or make improvements to the value of one hundred dollars annually, computing the periods from the first day of January next succeeding the date of location, the federal law provides, that "the claim, or mine upon which such failure occurs, shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, or their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."<sup>1</sup>

In dealing with the subject of relocations, it is not our purpose at this time to enter into a critical discussion of the subject of abandonment or forfeiture, or the restoration of the estate by a resumption of work. We defer this for a subsequent chapter. The scope of this article is limited to the manner in which claims may be relocated after the rights based upon the original location are unquestionably lost, or subject to forfeiture, for failure to comply with the requirements of the law.

The circumstances under which the estate created by the perfection of a valid location may be extinguished, so as to restore the land to the public domain, and the manner in which such estate may be revived by the delinquent locator, will be fully explained in a succeeding title.

<sup>1</sup> Rev. Stats., § 2324.

§ 403. **New discovery not essential as basis of relocation.**—It is a well-established rule, that there can be no valid location of a mining claim without a discovery;<sup>1</sup> but it has been held, that it is not necessary that the locator should be the first discoverer of a vein, but it must be known to him, and claimed by him, in order to give validity to the location.<sup>2</sup>

So, if the original location was based upon a valid discovery, and the relocater finds the vein exposed within the limits of the claim, this is sufficient upon which to base a relocation.<sup>3</sup>

The theory of the law upon which the relocation is permitted is, undoubtedly, that if the original locator who made the discovery manifests his unwillingness to proceed with the development of the ground, and his location becomes subject to forfeiture for failure to perform the necessary work, any one may succeed to the right based upon the original discovery by relocating the ground, so that successive relocations based upon successive forfeitures may all be founded upon the one discovery. A new discovery is not requisite for each relocation.

§ 404. **Relocation admits the validity of the original.**—A relocation impliedly admits the validity of the prior location. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property.<sup>4</sup>

The courts draw a distinction between a locator and relocater, classing the former as an original discoverer of mineral before unknown, and the latter as the mere appropriator of mineral discovered by another who had failed to exercise the privilege conferred upon him by law. The relocation is equivalent to an admission that the relocater claims a forfeiture by reason of a failure on the part of the

<sup>1</sup> See, *ante*, § 335.

<sup>2</sup> *Jupiter M. Co. v. Bodie Cons. M. Co.*, 7 Saw. 96, 108.

<sup>3</sup> *Armstrong v. Lower*, 6 Colo. 393, 395.

<sup>4</sup> *Belk v. Meagher*, 104 U. S. 279, 289.

first locator to comply with the law. Such being the case, the only inquiry is, as to whether or no the original locator performed the requisite labor.<sup>1</sup>

§ 405. **Relocation by original locator.**—In speaking of relocation by an original locator, we have no reference to locations made for the purpose of curing defects, or re-adjusting boundaries. We have called these *amended* locations, and as such, have dealt with them in the preceding article. What we now refer to are cases wherein the original locator seeks to evade the requirements of the law as to development and annual expenditure, and endeavors to perpetuate his estate by periodical relocations.

The question was presented to the supreme court of Utah in the following form: "Can the locator of a quartz mining claim who has allowed his location to lapse by a failure to perform the necessary work make a relocation or new location covering the same ground?"<sup>2</sup>

The court failed to see any reason why such right should be denied. It based its ruling upon the following grounds:—

(1) That right is recognized by the circuit court of the ninth circuit<sup>3</sup> and by the land department;<sup>4</sup>

(2) The fact, that a prior locator, after his right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator, but to deny him the right to relocate is to deny him a privilege which is given to *strangers*.

The conclusion of the court is, that the prior locator, in addition to the right to resume work, and thus relieve himself from the danger of incurring forfeiture, should also have the same rights as strangers to relocate. Inferentially,

<sup>1</sup> *Wills v. Blain*, 4 New Mex. 378.

<sup>2</sup> *Warnock v. De Witt*, 11 Utah, 324. This case is now pending on appeal to the supreme court of the United States.

<sup>3</sup> *Hunt v. Patchin*, 35 Fed. 816.

<sup>4</sup> Acting Commissioner Holcomb, *Copp's Min. Lands*, 300.

at least, this doctrine receives some support from a case decided by the supreme court of Montana.<sup>1</sup>

We are fully aware of the weight to be given to the decisions of the supreme court of a state or territory, and for that reason it is with a great deal of hesitancy that we intrude our individual views in opposition to such a decision, in the absence of some authoritative ruling emanating from a court of equal dignity to support our theories. But the rule announced by the supreme court of Utah is so opposed to what we consider the true intent and spirit of the mining laws, that we feel justified in criticising it, and in doing so, to deferentially present our reasons for upholding a contrary doctrine.

In the first place, we think the fallacy of the rule is exposed upon the face of the decision, *ex visceribus suis*, considering the cases cited in it as a part of the decision:—

The doctrine asserted by the supreme court of Utah is *not* recognized by the circuit court of the ninth circuit in the case of *Hunt v. Patchin*.<sup>2</sup> That case involved a question between original co-locators, one of whom, by common consent of all, had relocated the claim in his own name, and afterwards undertook to claim the entire title as against his original co-tenants. This the court would not permit him to do. Under these circumstances, the relocating co-tenant could not, with any advantage to himself, deny the validity of the relocation, nor could he exclude his co-tenants from participating in such title as he acquired. In this case, a certificate of purchase was issued to the relocating claimant alone. The validity of the relocation was never questioned by the land department, which tribunal was probably never advised that the basis of the relocation was the dereliction of the relocator and his co-tenants. All that *Hunt v. Patchin* attempts to determine is, that whatever right accrues to one of several original locators under a relocation which is made

<sup>1</sup> *Saunders v. Mackey*, 5 Mont. 523.

<sup>2</sup> 35 Fed. 816.

in his name, by common consent, inures to the benefit of all. But that any such right accrues, the circuit court did not attempt to decide.

The ruling of the land department referred to<sup>1</sup> appears in the form of a letter addressed by Acting Commissioner Holcomb to a gentleman in Leadville. It was not a litigated case. The acting commissioner was of the opinion, that one of several co-locators, all of whom are in default, may relocate in his own name and hold it adversely to his former co-tenants.

As to the conclusion reached by the supreme court of Utah, there is every reason why the right to relocate should be given to strangers and should be denied to the original locator. Under the mining laws, discovery and appropriation are recognized as the sources of title to mining claims, and *development by working* as the condition of continued ownership until patent is obtained.<sup>2</sup>

After his discovery, the locator is allowed certain periods to perfect his location, and the period of one year from the first day of January next succeeding the date of his location in which to perform one hundred dollars' worth of labor.

Let us illustrate: A vein is discovered June 1, 1895. The locator has until January 1, 1897, in which to perform his work. He fails to do so; but on January 2, 1897, relocates the claim, basing his right to do so upon his own previous neglect to comply with the law. If he has the same right as a stranger to relocate under these circumstances, he has the same length of time allowed to a stranger to perform the first year's labor after the date of the relocation; that is, until January 1, 1899. On January 2, 1899, he may repeat this proceeding, and obtain an additional two years, and so on indefinitely. It seems to us, that this is a manifest fraud upon the government. It is a perversion of the law, and in direct violation of its spirit and intent, to say, that the original locator may take advantage

<sup>1</sup> Copp's Min. Lands, 300.

<sup>2</sup> Erhardt v. Boaro, 113 U. S. 527, 536.



of his own dereliction, and use his own neglect and wrong as a foundation to either perpetuate an estate or create a new one. The law under which he obtained his first privilege provides the only method by which his neglect can be condoned, and that is, by resuming work prior to relocation. It is illogical to say, that he may accomplish this result in any other way than by strictly pursuing the methods provided for by the statute.

There is another principle which seems to us to be decisive of the question: The forfeiture is not complete until a relocation has been made. It is the entry of a new claimant with intent to relocate the property, and not mere lapse of time, that determines the right of the original claimant.<sup>1</sup>

The right to enter and resume work prior to the relocation by another is evidence that the original estate is not wholly lost by the failure to do the work.<sup>2</sup>

To say that the original locator has the power within himself to make effectual a forfeiture arising from his own delinquency by perfecting a relocation, is to place in his hands the extraordinary privilege of holding mineral lands perpetually, without doing any work whatever, at least in those states where the relocater is not required to do preliminary work. Where he is required to perform such work, such performance might be treated as resumption, and no relocation is necessary. In any event, the rule upon this subject is uniform, because it is based upon the federal statute.

As was said by the supreme court of California, the work prescribed in the act must be done, or the claim is open to relocation, unless work is resumed before the second location is made. The conditions imposed by the act of congress are wise and salutary, and are by no means onerous. "It is the duty of the courts to hold the locators of " mining claims bound by them." <sup>3</sup>

<sup>1</sup> Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, 539.

<sup>2</sup> Lakin v. Sierra Buttes G. M. Co., 25 Fed. 337, 343.

<sup>3</sup> Russell v. Brosseau, 65 Cal. 605, 608; Du Prat v. Jaimes, 65 Cal. 555.

The right to relocate is given to others as a *penalty* imposed on the original locator for failure on his part to perform the conditions required of him. It is not conceded to him as a reward for his neglect, or as an inducement held out to him to evade the law.

We think we are justified in the conclusion, that the original locator, while he may amend his original location for the purpose of curing defects, rectifying lines, and including overlapping surfaces, cannot relocate the claim when his right to make such relocation is asserted by reason of his failure to comply with the requirements of the law as to continued development. The relocation by one of several co-owners will be discussed in the next section.

§ 406. **Relocation by one of several original locators in hostility to the others.**—If we are right in the conclusions reached in the preceding section, that the original locator cannot treat his failure to perform or resume work as the basis of a valid relocation, it must necessarily follow, that one of several locators seeking to obtain the entire title by reason of the failure of any of them to fulfill the requirement of the law, is likewise prohibited from making such relocation.

The supreme court of Montana has held, that mining claims owned by several in common must be "represented"—that is, the work must be performed—as if owned by one person; that "representation" is a unity; that co-owners may cause representative work to be done on the claim according to their respective interests, but when completed, it must amount to one whole representation; otherwise, the claim is not protected from relocation, and that under such circumstances, one of the co-owners might relocate.<sup>1</sup> But we think that this doctrine is opposed to the views of the supreme court of the United States announced in *Turner v. Sawyer*,<sup>2</sup> wherein it is said, that the general rule, that the purchase of an outstanding title, or incumbrance, upon

<sup>1</sup> *Saunders v. Mackey*, 5 Mont. 523.

<sup>2</sup> 150 U. S. 578, 586.

the joint estate for the benefit of one tenant in common inures to the benefit of all, because there is an obligation between them arising from their joint claim and community of interest, and that one of them shall not affect the claim to the prejudice of others, should apply to a case where one co-tenant of a mining claim secures the entire title in his individual name.<sup>1</sup>

The courts generally concede the rule to be, that where one of several co-owners in a mining claim applies for a patent in his own name, the excluded co-tenants are not adverse claimants within the meaning of the law requiring them to intervene in patent proceedings, as they claim equities which are based upon the legal title thus conveyed.<sup>2</sup>

Be that as it may, although the views announced by the supreme court of Montana seem to give support to the doctrine of the supreme court of Utah, cited in the preceding section, we cannot see why the reasoning applied by us in that section to the case of an individual locator should not apply with equal force to one of several locators. In the latter case, the obligation rests upon all alike to perform the required work. One of the co-tenants might save the entire estate by himself performing the labor. In such event, he would have a right of contribution against his co-tenants for their proportion of expenditures made to save the common estate, which he might assert, either in an action for partition,<sup>3</sup> or, perhaps, by "advertising out" under the provisions of the Revised Statutes.<sup>4</sup> But to say that one co-owner can make his own delinquency, as well as that of his co-tenants, the basis for acquiring a new title, seems to us repugnant to the intent and spirit of the law.<sup>5</sup>

**§ 407. Relocation by agent or others occupying contractual or fiduciary relations with original locator.**—An agent, trustee, or other persons holding confidential relations

<sup>1</sup> See, also, Freeman on Co-tenancy, § 151.

<sup>2</sup> *Sussenbach v. First National Bank*, 5 Dak. 477; *Brundy v. Mayfield*, 15 Mont. 201; *Doherty v. Morris*, 11 Colo. 12.

<sup>3</sup> *Holbrooke v. Harrington*, 36 Pac. 365.

<sup>4</sup> § 2324.

<sup>5</sup> See, *Royston v. Miller*, 76 Fed. 50.

with the original locator, will not be permitted to relocate mining claims, and secure to themselves advantages flowing from a breach of trust obligations<sup>1</sup> Where, however, a contractual or fiduciary relationship is terminated, the rule no longer applies, and a subsequent relocation by the former agent or trustee has been upheld.<sup>2</sup> An original locator cannot suffer forfeiture and relocate, or cause to be relocated by others in collusion with him, so as to cut off the rights of a mortgagee under a mortgage executed by such original locator.<sup>3</sup>

It has been suggested by the supreme court of Arizona, that an original locator, after sale by quitclaim deed to a third person who fails to perform the annual labor, may relocate and hold the claim.<sup>4</sup> But in such case, the obligation to perform the labor rested upon his grantee, and not upon the original locator, and by relocating, he does not profit by his own failure to perform the work. His grantee occupies the position of the original locator, and the latter, in relocating, that of a mere stranger to the title.

**§ 408. Manner of perfecting relocations—Statutory regulations.**—With the exception of the necessity for making a new discovery, the relocation of an abandoned mining claim is made in substantially the same manner as the original.<sup>5</sup>

The ground is "open to relocation in the same manner "as if no location of the same had ever been made."<sup>6</sup> By this is meant, that all the requirements of the law as to marking of boundaries, posting notices, recording certificates, performance of development work, and such other acts as are required by the federal or state laws, except the discovery, must be complied with in cases of relocation to

<sup>1</sup> *Lockhart v. Rollins*, 2 Idaho, 503, 514; *Utah M. & M. Co. v. Dickert & M. S. Co.*, 6 Utah, 183; *Largey v. Bartlett* (Mont.), 44 Pac. 962.

<sup>2</sup> *Page v. Summers*, 70 Cal. 121.

<sup>3</sup> *Alexander v. Sherman* (Ariz.), 16 Pac. 45.

<sup>4</sup> *Blake v. Theme* (Ariz.), 16 Pac. 270.

<sup>5</sup> *Armstrong v. Lower*, 6 Colo. 393.

<sup>6</sup> *Rev. Stats.*, § 2324.

the same extent as in original locations. The original locator and the relocater, in this respect, are on the same footing.<sup>1</sup>

Most of the precious-metal-bearing states have legislated upon the subject of relocating abandoned claims.

Colorado has enacted a law which provides, that the relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries, in the same manner as if it were the location of a new claim; or the relocater may sink the original shaft ten feet deeper than it was at the time of the abandonment, and erect new, or adopt old, boundaries, renewing the posts, if removed or destroyed. In either case, a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole, or any part, of the new location is located as abandoned property.<sup>2</sup> Arizona,<sup>3</sup> Idaho,<sup>4</sup> Montana,<sup>5</sup> New Mexico,<sup>6</sup> North Dakota,<sup>7</sup> South Dakota,<sup>8</sup> and Wyoming<sup>9</sup> have statutes of the same general character. There is no legislation upon the subject in either California, Washington, Utah, Oregon, or Nevada.

The supreme court of Montana has held, that if an original locator resumes work before the relocater re-marks the boundaries, and performs *all* the acts required to perfect a valid relocation, the forfeiture is not worked, and the right to relocate is lost.<sup>10</sup> A like doctrine is supported in California<sup>11</sup>.

<sup>1</sup> Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339, 342.

<sup>2</sup> Mills' Annot. Stats., § 3162.

<sup>3</sup> Laws 1895, p. 54, § xi.

<sup>4</sup> Laws 1895, p. 25, § vii.

<sup>5</sup> Rev. Code 1895, § 3615.

<sup>6</sup> Laws 1889, p. 42, § iii.

<sup>7</sup> Rev. Code 1895, § 1439.

<sup>8</sup> Comp. Laws of Dakota 1887, § 2010. Adopted by South Dakota — Laws 1890, ch. cv.

<sup>9</sup> Laws 1888, p. 89, § 21.

<sup>10</sup> Gonu v. Russell, 3 Mont. 358.

<sup>11</sup> Holland v. Mt. Auburn G. O. M. Co., 53 Cal. 149; Belcher Cons. G. M. Co. v. Deferrari, 62 Cal. 160; Pharis v. Muldoon, 75 Cal. 284.

It would seem, that in the case decided by the supreme court of Montana, the relocater had performed no act which by law was necessary to initiate a valid location. In California, until a very recent period, an original locator was not permitted any appreciable time whatever to mark his boundaries.<sup>1</sup> Where, however, under statutes which either contemplate or provide for a series of acts, the performance of which necessarily requires time, such as the sinking of a new discovery shaft ten feet deep, or an old one ten feet deeper, the performance of any one of these acts in the series ought to give the relocater the necessary time to complete the others. Otherwise, it is difficult to see how a valid relocation could ever be made, without the consent of the original locator. He could "resume work" at any time before the relocater had completed his development. Unless the relocater can be protected in his possession, for the purpose of completing his relocation, there is but little use in his attempting it. Each attempt at relocation would, at some stage, find the original locator in a state of "resumption." While forfeitures are odious, we think the courts are sometimes altogether too lenient in dealing with a class of people frequently found in mining camps, who will neither work themselves, nor permit others to do so.

Judge Hallett is of the opinion, that the right of the original locator to resume work and prevent forfeiture lapses, unless the right is exercised before another has taken possession of the property with intent to relocate it,<sup>2</sup> and Mr. Morrison shares these views,<sup>3</sup> which, in our judgment, are sound.

A discussion of what constitutes "resumption" is deferred for treatment in another chapter. Successive relocations may, of course, be made as often as the relocaters fail on their part to comply with the law. Where one has made a relocation and permits the time to elapse without

<sup>1</sup> See, *ante*, § 339.

<sup>2</sup> *Little Gunnell M. Co. v. Kimber*, 1 Morr. Min. Rep. 536.

<sup>3</sup> *Morr. Min. Rights*, 8th ed., p. 69.



performing the requisite work, he should be debarred the same as an original locator from again relocating. Whether, or no, such is the law, depends upon the correctness of our theories advanced in a preceding section.<sup>1</sup>

**§ 409. Right of second locator to improvements made by the first.** — When the estate of the first locator becomes extinguished by his failure to comply with the law, and the second enters and perfects his relocation, the dominion and control over the property passes to the latter. If the former thereafter remains in possession, unless at the time of the relocation he has resumed work, he is a mere occupant without color of title, and the completion of the second location, if effected peaceably and in good faith, operates in law as an ouster of the prior occupant.<sup>2</sup> Thereafter, the relocater is clothed with "the exclusive right of possession and enjoyment of all the surface included within the "lines of the location."<sup>3</sup>

Such improvements or betterments as have been placed upon the property by the original locator, if they fall within the class designated as fixtures, become a part of the realty, and the subsequent appropriation of the land carries with it, necessarily, whatever may be affixed to it. Prior to the determination of his estate by the perfection of a relocation, it cannot be doubted that the prior locator may sever and remove all machinery, buildings, and other improvements which, by the manner of their attachment to the soil, have become a part of the freehold. But his right of entry for that purpose ceases when his estate is terminated.

It is a general rule of law, that all improvements of this character upon public lands of the United States pass to the purchaser from the government,<sup>4</sup> and the relocater of

<sup>1</sup> See, *ante*, § 405.

<sup>2</sup> *Belk v. Meagher*, 3 Mont. 65, 80; S. C. on Appeal, 101 U. S. 279, 284. See, *ante*, § 218, 219.

<sup>3</sup> Rev. Stats. § 2322

<sup>4</sup> *Colbus v. Bartlett*, 44 Cal. 371; *Pennybecker v. McDougal*, 48 Cal. 163; *McKiernan v. Hesse*, 51 Cal. 594; *Treadway v. Sharon*, 7 Nev. 87.



a mining claim holds his estate by purchase.<sup>1</sup> One cannot set up equities in improvements against the government, or a purchaser from it,<sup>2</sup> and state statutes which permit their removal after the land has passed into private ownership are void, as interfering with the primary right of disposal of the soil reserved to the United States upon the admission of the several states.<sup>3</sup>

It is unnecessary to enter into a detailed discussion of what constitutes fixtures. It has been frequently held, that machinery, such as engines, boilers, hoisting-works, mills, pumps, and things of a like character annexed to the soil for mining, become part of the freehold.<sup>4</sup> As such, they will pass to the relocater.

While this is undoubtedly true, upon application for a patent the relocater will not be permitted to include in his estimate of the value of improvements required by law to be made as a condition precedent to patent, any of the labor done or improvements made by the original locator.<sup>5</sup> Expenditures and improvements for such purpose must have been made by the *relocater* or his *grantors*.<sup>6</sup>

## ARTICLE XII. LODES WITHIN PLACERS.

§ 413. Right to appropriate lodes within placers.	§ 415. Width of lode locations within placers.
§ 414. Manner of locating lodes within placers.	

**§ 413. Right to appropriate lodes within placers.**—That the two classes of mineral deposits, those falling within the designation of lodes, or veins, and those usually called placers, frequently exist in the same superficial area is a matter of common experience.

<sup>1</sup> Meyerdorf v. Frohner, 3 Mont. 282, 320. See, *ante*, § 233.

<sup>2</sup> Hawke v. Desebach, 115 U. S. 392; Sparks v. Pierce, *Id.* 408.

<sup>3</sup> Collins v. Bartlett, 44 Cal. 371.

<sup>4</sup> Merritt v. Judd, 14 Cal. 60; Treadway v. Sharon, 7 Nev. 37; Roseville Alta M. Co. v. Iowa G. M. Co., 15 Colo. 29.

<sup>5</sup> Acting Commissioner Holcomb, Copp's Min. Lands, 300; Commissioner Burdett, 1 Copp's L. O. 179.

<sup>6</sup> Rev. Stats., § 2322.

That when so found they may be held by the same or different persons, is well settled by both judicial and departmental decisions.<sup>1</sup>

While it is undoubtedly true, that a mining location, whether lode or placer, is property in the highest sense of the term, and when perfected is equivalent to a grant from the government,<sup>2</sup> yet it does not follow that the thing granted is the same in both classes of locations, nor that things reserved from the operation of one grant are likewise excepted from the operation of the other.

There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former, there is a grant of the exclusive right of enjoyment of the surface and everything within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface. No subsequent locator, either lode or placer, can invade such surface. On the other hand, lodes found within the placer surface, or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant.<sup>3</sup> Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is, to sever them from the body of the public lands, and to deal with them and the land immediately inclosing them as separate and distinct entities.

The location of mining ground for placer purposes does not effect such severance. The placer claimant *may*, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his

<sup>1</sup> Reynolds v. Iron S. M. Co., 116 U. S. 687, 695; Aurora Lode v. Bulger Hill Placer, 23 L. D. 95.

<sup>2</sup> Belk v. Meagher, 104 U. S. 284; Gwillim v. Donnellan, 115 U. S. 45.

<sup>3</sup> Reynolds v. Iron S. M. Co., 116 U. S. 687; Iron S. M. Co. v. Mike & Starr M. Co., 143 U. S. 394; Dahl v. Raunheim, 132 U. S. 260; Clary v. Hazlett, 67 Cal. 286.

prior placer appropriation.<sup>1</sup> This right to appropriate the lode must flow from the discovery of the *lode*. Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to *claim* it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; *provided*, always, that such appropriation is made and perfected peaceably and in good faith. In this respect, the same rules of law which govern the location of mineral land occupied or claimed by others under inchoate agricultural holdings, are to be applied. We have fully discussed this element in preceding articles. It is unnecessary to here repeat what is there said.<sup>2</sup>

The issuance of a placer patent containing within its limits a lode known to exist prior to the patent application, which lode is not claimed and applied for by the placer claimant as a *lode*, does not cut off the right to appropriate it in hostility to the patentee. His failure to include it in his placer application is a conclusive declaration that he has no right to it.<sup>3</sup>

While the land department at one time held, that with the issuance of the placer patent its jurisdiction terminated, and thereafter it had no right to entertain a subsequent application for a patent to a lode claim within the patented placer limits,<sup>4</sup> it subsequently changed its ruling to conform to the legal results necessarily flowing from the exposition of the law by the supreme court of the United States.<sup>5</sup>

<sup>1</sup> *Aurora Lode v. Bulger Hill Placer*, 23 L. D. 95.

<sup>2</sup> See, *ante*, §§ 206, 216, 219.

<sup>3</sup> Rev. Stats., § 2333; *Sullivan v. Iron S. M. Co.*, 143 U. S. 431, 434; *Reynolds v. Iron S. M. Co.*, 116 U. S. 687; *Iron S. M. Co. v. Mike & Starr G. & S. M. Co.*, 143 U. S. 394, 402; *Iron S. M. Co. v. Reynolds*, 124 U. S. 374; *United States v. Iron S. M. Co.*, 125 U. S. 673, *Noyes v. Mantle*, 127 U. S. 348, 353.

<sup>4</sup> *Rebel Lode*, 12 L. D. 683; *Pike's Peak Lode*, 14 L. D. 47; *South Star Lode*, 17 L. D. 280.

<sup>5</sup> *South Star Lode* (on review), 20 L. D. 204; *Butte & Boston M. Co.*, 21 L. D. 125.

It is not our purpose to here define what is meant by a "lode known to exist within the boundaries of a placer claim," as that phrase occurs in section twenty-three hundred and thirty-three of the Revised Statutes. This will be fully discussed when dealing with the subject of placer patents and the nature and extent of title conferred by placer locations. We are now concerned simply with the manner of locating lodes within placers, their existence being confessedly known prior to the application for the placer patent.

We are justified in deducing from the foregoing the following conclusions:—

(1) A perfected placer location does not confer the right to the possession of veins, or lodes, which may be found to exist within the placer limits at any time prior to filing an application for a placer patent;

(2) Such lodes may be appropriated (*a*) by the placer claimant, or (*b*) by others, provided the appropriation is effected by peaceable methods and in good faith;

(3) Where a lode is known to exist within the limits of a placer location at any time prior to the placer application for patent, and is not claimed in the application as a *lode*, the title to such lode does not pass by the patent, but it may be located by any one having the requisite qualifications, provided the location is made peaceably and in good faith.

§ 414. **Manner of locating lodes within placers.**—With the exception of determining the quantity of surface which may be taken in conjunction with a lode found within a placer claim, a question to be presented in the next section, there is no difference between the manner of locating such a lode and any other found within the public domain. It must be discovered and developed, the location must be marked upon the surface, and all other formalities required by federal or state legislation must be complied with to the same extent as in case of lodes

situated elsewhere. As the right necessarily flows from discovery, to perpetuate such right the subsequent acts resulting in a perfected location must be complied with.

As to the surface lines inclosing the lode, while the inclosed area may possibly be limited, yet their general direction with reference to the discovered vein must conform to the general rule governing lode locations.<sup>1</sup> In placer locations, except upon unsurveyed lands, and under certain specified conditions to be hereafter noted,<sup>2</sup> the boundaries must conform to the public surveys, without regard to the course or direction of veins which may be found therein. Such boundaries perform a different function from those required in the case of lode claims.

Whatever may be the dimensions of a placer location which, when participated in by an association of persons, may cover an area of one hundred and sixty acres,<sup>3</sup> a lode location within a placer cannot exceed the statutory limit as to length—that is, fifteen hundred feet. End lines must be established within this limit, and in order to acquire extralateral rights, should cross the located lode and be parallel to each other, or non-divergent in the direction of the dip. A placer boundary may be coincident with a lode boundary if so claimed and marked. But the rights upon the discovered lode will be defined only by the lode boundaries, established and marked as such. In this respect, the statute makes no distinction between lodes within placers and other lodes. In considering this class of lode location, the only debatable question is the quantity of surface which the locator may appropriate for the purpose of inclosing his lode. In all other respects the general rules apply.

§ 415. **Width of lode locations within placers.**—As to the amount of surface which may be appropriated in connection with a lode discovered within a placer, the question presents itself in two aspects:—

<sup>1</sup> Reynolds v. Iron S. M. Co., 116 U. S. 687, 694.

<sup>2</sup> See next chapter.

<sup>3</sup> Rev. Stats., § 2330.

(1) Where the lode is located and claimed by the placer claimant;

(2) Where it is located and claimed by others.

As to the placer claimant, there is no reason why he should not be permitted to select as much of the surface inclosing the lode as the law will permit in case of other lode locations; that is, within the limit of fifteen hundred by six hundred feet, in the absence of state laws or local regulations restricting the right to less. There is no requirement that land contiguous to the lode, and appropriated with it, should be non-mineral in character. As he owns the surface of the placer, except as against a lode locator, no one can complain if the placer claimant takes any quantity within the prescribed limit. But he is required to take at least twenty-five feet on each side of the center of the vein, and pay therefor at the rate of five dollars per acre. The remainder he may enter as placer ground at half that rate.<sup>1</sup>

But let us assume a case of a lode discovered within a prior placer claim by a stranger to the placer title, such discovery ante-dating the application for a placer patent. That such lode may be located and claimed by the discoverer seems to be well settled. But the extent of surface to which such locator may be entitled, with due regard to the rights of the prior placer claimant, is the subject of debate. The question assumes this form: What is in contemplation of law reserved out of a placer location? or, to what extent is the surface of a prior placer location subject to invasion and delimitation by a subsequent discoverer of a lode within the placer boundaries?

Section twenty-three hundred and thirty-three of the Revised Statutes furnishes no key to the solution of the question. We must, therefore, resort to the entire body of the mining law and consider its manifest intent before we may reach a satisfactory conclusion.

The question may be solved in two ways:—

<sup>1</sup> Rev. Stats., § 2333.



(1) Either the lode locator is entitled to the full width allowed to other lode locations, or

(2) He is allowed only such surface as may be reasonably necessary for the enjoyment of the lode.

The supreme court of the United States has held, in *Noyes v. Mantle*,<sup>1</sup> that a placer patent reserves a lode claim, located prior to the application for patent, to its full extent; but in that case, although the decision as reported is silent as to the date of the placer location, it is quite manifest that the lode was discovered and located prior to the location of the placer.<sup>2</sup> Such prior location withdraws the area covered, and the subsequent placer locator could, of course, obtain no rights as against the lode locator. This is not the case we have assumed. If, in the *Noyes-Mantle* case, the lode location in controversy had been the junior in date, we might infer from the decision that the subsequent lode locator was authorized to select, within the boundaries of the placer, a full surface claim. But as heretofore indicated, the lode location in that case ante-dated not only the application for placer patent, but the *location* of the placer. We are not aware that the precise point under discussion has ever been determined by the courts.

When we examine the rulings of the land department, we find that they are not uniform.

Originally, that department held, that the claimant of a lode within placer limits could only assert the right, as against a placer patentee, to twenty-five feet on each side of the center of the vein. If he sought to claim more, he could only protect his right to the increased area by advertising the placer applicant. Failing to do so, he was limited to a width of fifty feet.<sup>3</sup>

This was before the decision in *Noyes v. Mantle* (*supra*). Subsequent to this decision, the department reached the

<sup>1</sup> 127 U. S. 348.

<sup>2</sup> The record in this case, as filed, discloses the fact that the lode was located in April, and the placer the following October.

<sup>3</sup> *Shenbar Lode*, 1 L. D. 551; *Id.*, 3 L. D. 388.



following conclusions, after quoting from the cases of *Noyes v. Mantle and Reynolds v. Iron S. M. Co.*:—<sup>1</sup>

“ It thus appears, that the limitation of the width of the  
“ claim in section twenty-three hundred and thirty-three,  
“ Revised Statutes, is only applicable where the same claim-  
“ ant seeks a patent for a vein, or lode, included within the  
“ boundaries of his placer claim, and has no application  
“ to a lode claim properly perfected by another, prior  
“ to the date of the application for patent for placer claim,  
“ whose boundaries include the lode claim. If, therefore,  
“ it shall appear from the record that there is a lode claim  
“ within the boundaries of a placer claim, then that lode  
“ claim in its full extent should be excepted from the placer  
“ patent.”<sup>2</sup>

But in this case the department declined to patent the lode claim at all for the reason, that its jurisdiction had been exhausted by the issuance of the placer patent—a ruling which, as heretofore noted,<sup>3</sup> was subsequently changed. The last expression of opinion by the land department upon the subject under consideration is found in a decision by Secretary Smith in the case of the *Aurora Lode v. The Bulger Hill and Nuggett Gulch Placer*.<sup>4</sup>

In this case, the placer claims were first located, the Bulger Hill on March 19th, and the Nuggett Gulch on April 6, 1881. The Aurora Lode was located April 9th of the same year. The properties had been in litigation, arising out of patent proceedings, the Aurora Lode claimant having applied for a patent, which was adversed by the placer claimant, the judgment being in favor of the latter.<sup>5</sup>

Notwithstanding this, the land department entertained the protest of the lode claimant against the issuance of a patent to the placer claimant, and after discussing the effect of the judgment of the court, and the relative rights of the two classes of claimants, the secretary of the interior thus expresses his views:—

<sup>1</sup> 116 U. S. 687; 124 U. S. 374.

<sup>2</sup> *Pike's Peak Lode*, 10 L. D. 200, 203.

<sup>3</sup> See, *ante*, § 413.

<sup>4</sup> 23 L. D. 95, 348.

<sup>5</sup> *Bennett v. Harkrader*, 158 U. S. 441.

“The only question which presents any serious difficulty to my mind relates to the extent of surface area the lode claimant will be entitled to in the event he sustains, by proof in the regular way, the allegations of his protest. His claim as originally located appears to be something over five hundred feet in width at the points of conflict with the placer locations. The extensive and valuable improvements erected upon the claim are alleged to be upon that part within the overlap. The surface ground being, however, only an incident to the lode, and not a part of it, I am of the opinion, that under the judgment of the court, the placer claimant is entitled to the surface area within the overlap, except so much thereof as is necessary to the occupation, use, operation, and enjoyment of the lode claim by its owners. This may be more or less, according to the extent and location of the present improvement, if any, and other conditions peculiar to this particular claim. I know of no established precedent controlling in such a case as this, but in view of the superior right of the placer claimant to the surface area as established by prior location and by the judgment of the court in the adverse proceedings, I do not think that the superior right of the lode claimant to the possession of his lode, if its discovery, location, and known existence be true, as alleged, should be allowed to carry with it more surface ground within the overlap than is necessary for the occupation, use, operation, and full enjoyment thereof. Having been defeated in the adverse proceedings in the court, it would appear to be but just and right that the lode claimant should be thus restricted as touching the surface area of his claim, and, indeed, such seems to be necessary in order to give effect to the court's judgment.”

Without stopping to consider the binding effect of the judgment in the adverse proceedings as an estoppel upon the lode claimant, we think that the ruling of the secretary proceeds upon considerations of an equitable nature, rather than upon anything deducible from the mining laws. If we assume, that nothing is reserved out of the placer location but the lode itself, we practically concede that the reservation is of no substantial benefit to any one, as the right to enjoy it would be practically denied. The

placer locator would hold everything, except the ledge bounded by its inclosing walls, and no right of entry over or through the placer ground would be permitted.<sup>1</sup> Or, at the utmost, the lode claimant would only be entitled to an *easement* over the placer ground, upon the principle, that a reservation of a thing out of a grant is a reservation of whatever may be necessary to its enjoyment.

But the mining laws contemplate no such conditions. The only method by which the lode may be located is by defining a surface inclosing it." The only clause which defines or limits this surface is found in section twenty-three hundred and twenty of the Revised Statutes. This is applicable to all lodes, or veins. No exception is made of such as exist, or may be found, in placers.

The conclusion seems logical, that if a lode within a placer is subject to appropriation at all, it may be appropriated the same as if it were situated elsewhere. The placer claimant locates with the full knowledge, that a lode discovered within the limits of his claim will not belong to him by virtue of his placer location; and that when such is discovered it may be located by those whose rights can only be defined by end and side lines carving out of the placer a surface area. The government says to him, in effect: "You may locate this ground which appears to be placer, but you do so with the distinct understanding, that if a lode is discovered therein before you apply for a patent, such lode shall belong to him who first discovers and locates it. Such discovery will entitle the discoverer to all privileges which are accorded with respect to lodes found elsewhere on the public domain."

If a patent issues for a placer claim which contains a lode, or vein, the existence of which was known to the placer claimant prior to his application for such patent, by failing to claim it, he cannot object to its subsequent appropriation by others.

We do not understand that, in such an instance, the

<sup>1</sup> Dower v. Richards, 73 Cal. 477, 480.

<sup>2</sup> See, *ante*, §§ 71, 361.

patent to the placer claimant affects the question. The right acquired by the placer location in legal contemplation is, as against strangers, as great as that conveyed by patent.<sup>1</sup> A lode claimant cannot carve out of the placer surface any greater area before the placer patent issues than he could if he located the excepted lode after the patent. The patent confirms to the placer locator all the rights enjoyed under the location — no more — no less.

Therefore, the existence, or non-existence, of a patent is of no moment if it be conceded that the lode is one that is subject to location.

While the suggested solution on this subject of width of lodes within placers is open to some criticism, in our judgment it is the only one logically deducible from a full consideration of the entire body of the mining laws in connection with the adjudicated cases upon the subject.

Is there anything in the adjudicated cases which inferentially militates against this view?

Our attention is again directed to the controversies arising out of the blanket deposits of Leadville, and in construing the decisions on the subject of lodes within placers, regard must be had to the circumstances of each particular case.

In the case of *Reynolds v. Iron Silver Mining Company*,<sup>2</sup> there was no surface conflict between the lode claimants and the placer patentee. There was no attempt by anyone to locate the lode within the placer boundaries. The lode claimants sought to justify their presence underneath the Wells and Moyer placer, on the ground that they were following a vein on its downward course, having the apex outside of the placer and within the Pinnacle and Crown Point lode claims. They failed in this at the first trial for the reason, that the trial court found that they had located across the vein instead of along it. The court decided in favor of the placer claimants, although the evidence tended to show that the placer claimants at the time

<sup>1</sup> *Chambers v. Harrington*, 111 U. S. 347, 353.

<sup>2</sup> 116 U. S. 687.

of their application for patent knew that this blanket vein existed underneath the surface, thus holding, that the placer patent would carry that portion of the lode on its *dip* underlying the placer surface as against one failing to show a superior right, and that the possession of the lode by the lode claimants underneath the placer surface was not such superior right. When the case reached the supreme court of the United States, that court assumed that the evidence was sufficient to establish the existence of a known lode, and overruled the trial court, holding, that as the lode was reserved out of the placer patent, the *possession* of it was a right superior to that granted by the placer patent. As the placer patent did not cover any part of the apex of the vein, it is difficult to see how anyone could locate it within the placer boundaries. How could the placer claimant assert a right to it at the time of applying for patent, and draw side lines equidistant from the *center* of the vein if the placer location had no part of the apex? This state of facts explains the following language of the court:—

“ We are of the opinion, that congress meant that lodes  
“ and veins known to exist when the patent was asked for  
“ should be excluded from the grant, as much as if they  
“ were described in clear terms. It was not intended to  
“ remit the question of their title, to be raised by some one  
“ who had, or might get, a better title, but to assert that no  
“ title passed by the patent, and in such case it does not  
“ pass to the patentee.

“ He takes his *surface land* and his placer mine, and such  
“ lodes, or veins, of mineral matter within it as were un-  
“ known, but to such as *were known* to exist, he gets by that  
“ patent no right whatever. The title remaining in his  
“ grantor, the United States, to this vein, the existence of  
“ which was known, he has no such interest in it as author-  
“ izes him to disturb any one else in the peaceable posses-  
“ sion and mining of that vein.

“ When it is once shown that the vein was *known to exist*  
“ at the time he acquired title to the placer, it is shown  
“ that he acquired no title or interest in that vein by his  
“ patent.”

How can a vein be described "in clear terms," except by metes and bounds? How can it be described by metes and bounds unless it is located? And how can it be located unless its top, or apex, is found,<sup>1</sup> and its center line established for the purpose of determining the position of the side lines?

At the second trial, the lode claimants abandoned the apex theory, and disavowed their right to lateral pursuit, resting on their possession. The placer claimants attempted to fortify their right to the ore bodies by showing ownership of the Rock and Dome lode claims containing the apex of the vein, adjoining the Pinnacle and Crown Point on the north, and sought to trace their vein in its downward course from its apex to the point of the alleged trespass. This the trial court refused to permit. The supreme court of the United States held this to be error. It also found, that no vein was known to exist within the limits of the placer at the time of the placer application. Therefore, the placer patent prevailed.<sup>2</sup>

Judge McCrary was of the opinion, that to be excepted out of a placer patent a lode must have been *located* and defined by metes and bounds before the application for patent.<sup>3</sup>

In this view he was upheld by a dissenting opinion of Chief Justice Waite in *Reynolds v. Iron S. M. Co.*,<sup>4</sup> and by a specially concurring opinion of Judge Field in *Sullivan v. Iron S. M. Co.*,<sup>5</sup> but this doctrine has been repeatedly denied by the supreme court of the United States.<sup>6</sup>

After a full consideration of all the cases of which we have any knowledge, we think the current of authority supports, rather than negatives, our conclusions.

While the result of these conclusions, when applied to the case of a known lode within a patented placer, is

<sup>1</sup> See, *ante*, § 394.

<sup>2</sup> *Iron S. M. Co. v. Reynolds*, 124 U. S. 374.

<sup>3</sup> *Iron S. M. Co. v. Sullivan*, 16 Fed. 829.

<sup>4</sup> 116 U. S. 698.

<sup>5</sup> 143 U. S. 436.

<sup>6</sup> *Sullivan v. Iron S. M. Co.*, 143 U. S. 431, 433, and cases there cited.

seriously opposed to our pre-conceived notions as to the inviolability of a government patent, yet the difficulty flows from the decisions of the courts holding that such lodes are reserved from the patent, whether located or not. If so reserved, they may be located; if located, they must be inclosed within a defined surface area, and there is but one section of the law which limits the quantity of such surface.

We shall have occasion to again refer to this subject when dealing in subsequent chapters with the force and effect of a government patent, and the proceedings by which it is obtained.



## CHAPTER III.

### PLACERS AND OTHER FORMS OF DEPOSIT NOT "IN PLACE."

#### ARTICLE I. CHARACTER OF DEPOSITS SUBJECT TO APPROPRIATION UNDER LAWS APPLICABLE TO PLACERS.

- II. THE LOCATION AND ITS REQUIREMENTS.
- III. THE DISCOVERY.
- IV. STATE LEGISLATION AS TO POSTING NOTICES AND PRELIMINARY DEVELOPMENT WORK.
- V. THE SURFACE COVERED BY THE LOCATION—ITS FORM AND EXTENT.
- VI. THE MARKING OF THE LOCATION ON THE GROUND.
- VII. THE LOCATION CERTIFICATE AND ITS RECORD.
- VIII. CONCLUSION.

#### ARTICLE I. CHARACTER OF DEPOSITS SUBJECT TO APPROPRIATION UNDER LAWS APPLICABLE TO PLACERS.

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| § 419. The general rule.   | § 423. Natural gas.  |
| § 420. Specific substances classified as subject to entry under the placer laws. | § 424. Brick clay.   |
| § 421. Building stone and stone of special commercial value.                     | § 425. Phosphatic deposits.                                |
| § 422. Petroleum.  | § 426. Tailings.   |
|  | § 427. Subterranean gravel deposits in ancient river beds. |
|  | § 428. Beds of streams.                                    |

§ 419. **The general rule.** In a preceding chapter,<sup>1</sup> in determining what constitutes "mineral land," which as such is susceptible of appropriation under the mining laws, we have to some extent anticipated much that might be properly said in defining the character of deposits which are subject to appropriation under the laws applicable

<sup>1</sup> See, *ante*, tit. iii., ch. i., §§ 85-98.

to placers, and we have there endeavored<sup>1</sup> to formulate general rules by which the mineral character of substances is to be established. In conformity with these rules, land of the public domain may be entered under the laws applicable to placers when it is shown to have upon or within it such a substance as falls within the classification named in section ninety-eight, if such substance is found in the form of superficial or other deposits not *in place*. If a discovered deposit satisfies the law as to its mineral character, and it is not found in veins of quartz, or other rock in place, it may be appropriated under the laws applicable to placers. What constitutes "rock in place" has been fully discussed.<sup>2</sup>

We say that all forms of deposit, other than those occurring in veins of rock in place, must be appropriated under the laws applicable to *placers*, for the reason, that *placers* present, in popular estimation, the highest type of deposits which do not occur in veins of rock in place, and are the only class of such deposits as are individualized and specially named in the statute.<sup>3</sup>

The right to acquire title to "claims usually called "placers" was granted for the first time by the mining act of July 9, 1870.<sup>4</sup> This has always been familiarly called the "placer law," in contradistinction to the "lode law" of July 26, 1866. The subsequent legislation preserved the distinction, so that, colloquially speaking, mineral deposits are to be treated either as lodes or placers. In time, *placer*, which was the name given by the Spaniards to the auriferous gravels of America,<sup>5</sup> has become a generic term, in which all forms of deposit, other than those occurring in veins, are popularly included.

Dr. Raymond, in his "Glossary of Mining and Metallurgical Terms,"<sup>6</sup> defines the word *placer* as, a deposit of

<sup>1</sup> See, *ante*, § 98.

<sup>2</sup> See, *ante*, §§ 299-301.

<sup>3</sup> Rev. Stats., § 2329.

<sup>4</sup> 16 Stats. at Large, 217.

<sup>5</sup> *Moxon v. Wilkinson*, 2 Mont. 421.

<sup>6</sup> Trans. Am. Inst. Min. Eng., vol. ix., p. 164.

valuable mineral found in particles in *alluvium*, or *diluvium*, or beds of streams, and enumerates gold, tin ore, chromic iron, iron ore, and precious stones, as being found in placers. He adds to the definition the statement, that by the United States statutes, all deposits not classed as veins of rock in place are considered *placers*.

As was said by the supreme court of the United States, in distinguishing the two classes of deposits: "Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath."<sup>1</sup>

Assuming that our definition of "mineral," outlined in a previous chapter,<sup>2</sup> is based upon a correct interpretation of the law, there should be but little difficulty in determining whether land containing a given substance not in place is subject to entry under the placer laws, or not. The element of commercial value, its susceptibility of being extracted and marketed at a profit, and not its metallic or chemical character, are the controlling factors in determining the question.

This is clearly shown, not only by the evolution of denotation, illustrated in the history of English jurisprudence and the decisions of the American courts, but by a long line of departmental rulings, uniform, except as to certain specific substances. As was said by the supreme court of the United States: "The construction given to a statute by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."<sup>3</sup>

While this element of profit, or commercial value, has generally pervaded the rulings of the land department, we

<sup>1</sup> Reynolds v. Iron S. M. Co., 116 U. S. 687, 695.

<sup>2</sup> See, *ante*, §§ 85-96.

<sup>3</sup> United States v. Moore, 95 U. S. 760; Hastings & Dakota R. R. v. Whitney, 132 U. S. 457; Hahn v. United States, 107 U. S. 402; Brown v. United States, 113 U. S. 568; Doe v. Waterloo M. Co., 70 Fed. 455.

find, that in dealing with certain specific substances, either by reason of their common-place character, or the other extreme, their unique and peculiar properties, the department has lost sight of this controlling factor, and leaned toward strict and, frequently, we think, strained rules of construction. Owing to the infinite variety in nature, the application to individual instances of general laws framed and construed on broad theories may seem to produce absurd results. But this in no sense proves that the law or the general rule of construction is absurd. We cannot conceive of any class of deposits of the general character under consideration which may not fairly be tested by the general rules announced in section ninety-eight.

That the true position of the land department upon this subject may be fairly presented, it is necessary to consider its rulings as to specific substances.

**§ 420. Specific substances classified as subject to entry under the placer laws.**—Among the substances, other than those of a metallic character, which have been classified as mineral, and when occurring in the form of deposits not in place, lands containing them have been held to be subject to appropriation under the placer laws, we note the following:—

Alum;<sup>1</sup> asphaltum;<sup>2</sup> borax;<sup>3</sup> diamonds;<sup>4</sup> gypsum;<sup>5</sup> kaolin, or china clay;<sup>6</sup> marble;<sup>7</sup> mica;<sup>8</sup> soda, carbonate and nitrate;<sup>9</sup> slate, for roofing purposes;<sup>10</sup> umber.<sup>11</sup>

As to these substances, we understand the rule is uniform, the elements of quantity and quality being present,

<sup>1</sup> Copp's Min. Lands, 50; 2 L. D. 707.

<sup>2</sup> Copp's Min. Lands, 50.

<sup>3</sup> *Id.* 50, 100; 2 L. D. 707; Copp's Min. Dec. 194; 1 Copp's L. O. 11.

<sup>4</sup> Copp's Min. Lands, 88.

<sup>5</sup> *Id.* 309.

<sup>6</sup> *Id.* 121, 176, 209; 1 L. D. 565; Montague v. Dobbs, 9 Copp's L. O. 165.

<sup>7</sup> Copp's Min. Lands, 176.

<sup>8</sup> *Id.* 182.

<sup>9</sup> *Id.* 50; 2 L. D. 707.

<sup>10</sup> Copp's Min. Lands, 143; 1 Copp's L. O. 132.

<sup>11</sup> Copp's Min. Lands, 161.

by which the value of the land, for the purpose of removing and marketing the product, is determined. Other substances require specific mention.

§ 421. **Building stone, and stone of special commercial value.**—As heretofore observed,<sup>1</sup> congress, on August 4, 1892, enacted a law, wherein it provided, that any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims.<sup>2</sup> The previous rulings by the land department, as to whether land containing stone of this character was subject to entry under the placer laws, were not uniform.

In the case of Bennett,<sup>3</sup> Commissioner McFarland expressed the opinion, that lands of such character were subject to such entry.

Some years later, Assistant Secretary Chandler declined to accept the views of the commissioner, and established the contrary doctrine.<sup>4</sup> The following year, the same assistant secretary "explained" and "distinguished" his previous ruling, and practically adopted the views of Commissioner McFarland in a case involving the interpretation of the law as it existed prior to the passage of the act of August 4, 1892.<sup>5</sup>

Secretary Noble held, that this class of land was not "mineral land" so as to preclude its entry under the agricultural land laws, although the proof showed that the tract in question was more valuable for the building stone it contained than for agricultural purposes, following the first ruling of Assistant Secretary Chandler.<sup>6</sup>

A few months later, Secretary Smith held, that under the law as it existed, prior to the passage of the act of

<sup>1</sup> See, *ante*, § 139.

<sup>2</sup> 27 Stats. at Large, 348.

<sup>3</sup> 1884, 3 L. D. 110.

<sup>4</sup> *Conlin v. Kelly* (1891), 12 L. D. 1.

<sup>5</sup> *McGlenn v. Wienbroer*, 15 L. D. 370.

<sup>6</sup> *Clark v. Ervin* (Feb. 1893), 16 L. D. 122.

August 4, 1892, land containing a deposit of sandstone of a superior quality, for building and ornamental purposes, and valuable only as a stone quarry, might be entered as a placer claim under the general mining laws,<sup>1</sup> which ruling was practically ignored by Assistant Secretary Sims in a later case.<sup>2</sup>

The passage of the act of congress referred to, occurring as it did subsequent to Assistant Secretary Chandler's first ruling, was a legislative affirmance of the theory of interpretation applied to other classes of non-metallic substances, and a recognition of the rule which has for its foundation the element of commercial value. More than once, congress has intervened when the department has undertaken to disregard this element, by applying arbitrary rules to individual cases. A notable instance will be found when we reach the subject of petroleum.

The supreme court of Montana followed the ruling of Commissioner McFarland in the Bennett case.<sup>3</sup> The supreme court of Washington declined to accept the reasoning of the supreme court of Montana, and held, that the term "mineral" was intended to embrace only deposits of *ore*, and the idea of a non-mineralized deposit was excluded.<sup>4</sup>

As the law now stands, lands containing deposits of building stone in such quantities as to render them more valuable for quarrying purposes than any other, may be entered as placers under the mining laws, or purchased under the stone and timber act of June 3, 1878.<sup>5</sup>

Lands containing limestone used for fluxing in metallurgical operations, or for the purpose of manufacturing the lime of commerce, have been held to be subject to entry under the placer laws.<sup>6</sup>

<sup>1</sup> Van Doren v. Plested, 16 L. D. 508.

<sup>2</sup> *In re Delaney*, 17 L. D. 120. See, also, *In re Simon Randolph*, 23 L. D. 329.

<sup>3</sup> Freezer v. Sweeney, 8 Mont. 508.

<sup>4</sup> Wheeler v. Smith, 5 Wash. 704.

<sup>5</sup> 20 Stats at Large, 89. See, *ante*, § 210.

<sup>6</sup> Commissioner Burdett (1875), Copp's Min. Lands 176; Maxwell v. Brierly (1883), 10 Copp's L. O. 50; Shepherd v. Bird (1893), 17 L. D. 82; Johnston v. Harrington, 5 Wash. 93.

§ 422. **Petroleum.**—Petroleum has always been recognized as a mineral.<sup>1</sup> As was said by the supreme court of Pennsylvania: "It is a mineral substance obtained from the earth by the process of mining, and lands from which it is obtained may, with propriety, be called mining lands;"<sup>2</sup> although that court had previously held, that while admitting petroleum to be mineral, it was not included in a reservation of "mineral" in a deed.<sup>3</sup>

Judge Ross, sitting as circuit judge in the ninth circuit, held, that public land containing petroleum could only be acquired pursuant to the provisions of the mining laws relating to placer claims.<sup>4</sup> Until a comparatively recent period, it would seem that this view was entertained by the land department.<sup>5</sup>

As heretofore noted in a previous section,<sup>6</sup> Secretary Hoke Smith, in August, 1896, ruled, that petroleum lands were not mineral lands, could not be entered under the mining laws,<sup>7</sup> and might be selected by the states in lieu of lost sixteenth and thirty-sixth sections.<sup>8</sup>

Congress promptly intervened, as it had on a previous occasion in reference to building stone,<sup>9</sup> and by act approved February 11, 1897, ordained:—

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum, or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum, or other mineral oils, which have heretofore been filed upon, claimed, or

<sup>1</sup> See, *ante*, § 93.

<sup>2</sup> *Gill v. Weston*, 110 Pa. St. 316. See, also, *Sloughton's Appeal*, 88 Pa. St. 198; *Thompson v. Noble*, 3 Pittsb. 201.

<sup>3</sup> *Dunham v. Kirkpatrick*, 101 Pa. St. 26.

<sup>4</sup> *Gird v. California Oil Co.*, 60 Fed. 531, 532.

<sup>5</sup> *In re A. A. Dewey*, 9 Copp's L. O. 51; *Downey v. Rogers*, 2 L. D. 707; *In re Samuel Rogers*, 4 L. D. 284; *Roberts v. Jepson*, 4 L. D. 60; *Peru Oil Co.*, 16 L. D. 117.

<sup>6</sup> See, *ante*, § 138.

<sup>7</sup> *Ex parte Union Oil Co.*, 23 L. D. 222.

<sup>8</sup> *Chandler v. State of California*, Oct. 27, 1896.

<sup>9</sup> See, *ante*, § 421.



“improved as mineral, but not yet patented, may be held  
“and patented under the provisions of this act the same as  
“if such filing, claim, or improvement were subsequent to  
“the date of the passage hereof.”<sup>1</sup>

This, of course, settles the question for the future. We think the act was but a legislative recognition of the law as it previously existed.

§ 423. **Natural gas.**—Natural gas is as much an article of commerce as iron ore, oil, coal, petroleum, or any other of the like products of the earth.<sup>2</sup>

“It is true,” said the supreme court of Pennsylvania, “that gas is a mineral, but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than the mere decision.”<sup>3</sup>

It was held by the court of appeals of Ontario, that natural gas is a mineral within the meaning of a statute which gives corporations power to sell or lease mineral rights under highways;<sup>4</sup> and the circuit court of the United States, for the northern district of New York, has decided, that this commodity, when brought into this country from Canada through pipes, was exempt from duty as “crude mineral.”<sup>5</sup>

While, owing to its “fugitive and wandering existence within the limits of a particular tract,”<sup>6</sup> the appropriation of it under the mining laws applicable to placers suggests an apparent absurdity, yet, as it is a mineral, is an article of commerce, and of great utility in an economic sense, we do not see why lands shown to contain it in

<sup>1</sup> This act was approved after § 138 of this treatise had been printed.

<sup>2</sup> *State v. Indiana & Ohio O. G. & M. Co.*, 2 Int. St. Com. Rep. 758. See interesting note in 25 Law. Rep. Annot. 222.

<sup>3</sup> *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 130 Pa. 235; S. C., 5 Law. Rep. Annot. 731.

<sup>4</sup> *Ontario Nat. Gas Co. v. Gosfield*, 18 Ont. App. 626.

<sup>5</sup> *In re Buffalo Nat. Gas Fuel Co.*, 73 Fed. 191.

<sup>6</sup> *Brown v. Vandergrift*, 80 Pa. 147.

quantities sufficient to make them more valuable for that purpose than any other should not be entered under the placer laws. The difference between asphaltum, mineral tar, petroleum, and natural gas, is only one of degree

§ 424. **Brick clay.**—If lands containing kaolin, or china clay, are subject to entry under the placer laws, it is difficult to see upon what principle lands chiefly valuable for deposits of brick clay should be excepted from such entry. But Secretary Vilas held, that although a given tract was undoubtedly more valuable as a "clay placer" than for any other purpose, it was not mineral land, and could not be appropriated under the mining laws.<sup>1</sup>

The manufactured product from a bed of brick clay is more common-place than the porcelain obtained from kaolin, or china clay, but we cannot understand why this should make any difference. The element of value in both cases rests upon the marketability of the manufactured product. Under the English decisions, brick clay is classified as a mineral under the "railway clauses act,"<sup>2</sup> and we can conceive of no logical reason why, in the administration of the federal mining laws, any discrimination should be made as between the finer and coarser grades of a substance, if it can be extracted, removed, and marketed at a profit.

§ 425. **Phosphatic deposits.**—The only public land state in the Union where the phosphatic deposits occur in appreciable quantities is Florida. They have been extensively mined in South Carolina since 1868, but their existence in Florida was not known until 1887, since which time they have come into prominence, and have assumed considerable economic importance. They are, in general, most abundant in ancient river bottoms, where they have

<sup>1</sup>Dunlue Placer Mine, 6 L. D. 761. See, also, *Jordan v. The Idaho Aluminum M. & M. Co.*, 20 L. D. 500.

<sup>2</sup>See, *ante*, § 92, p. 100, note 3 and 4.

been washed together from their original beds.<sup>1</sup> Since 1890, mining has been conducted upon a large scale, the shipments constituting a heavy item in the freights of the several railroads of the state. The raw material is consumed in large quantities in the United States, and it is exported to the various parts of Europe.<sup>2</sup>

Secretary Smith held, that land chiefly valuable for phosphate deposits is mineral in character,<sup>3</sup> although, under a special act of congress, a homestead claimant who had initiated a right in ignorance of the existence of such deposits within the tract might perfect his entry, notwithstanding their discovery prior to the final entry,<sup>4</sup> thus changing the rule governing ordinary mineral lands within inchoate homestead claims, announced in a previous section.<sup>5</sup>

The same secretary also held, that under the land grant acts to the Florida Railway and Navigation Company, passed respectively in 1856 and 1874, lands containing this class of deposits might be selected in satisfaction of the grants.<sup>6</sup> The reasons assigned are:—

(1) That the act of 1856 did not in terms reserve mineral lands;

(2) That in the act of 1874, where mineral lands are reserved, the word "mineral" is used in a limited sense, and cannot be construed to include phosphates.

We have heretofore endeavored to show that this is an erroneous theory, and have fully explained the law as we understand it in the article on railroad grants.<sup>7</sup>

As a matter of *present* classification, Secretary Smith concedes that lands of this class are subject to entry under the mining laws.

<sup>1</sup> Dana's System of Mineralogy, 6th ed., p. 769.

<sup>2</sup> Preliminary Sketch of the Phosphates of Florida, by George H. Eldridge. Trans. Am. Inst. Min. Eng., vol. xxi., p. 196.

<sup>3</sup> Gary v. Todd, 18 L. D. 58.

<sup>4</sup> *Id.* (on review), 19 L. D. 475.

<sup>5</sup> See, *ante*, § 208.

<sup>6</sup> Tucker v. Florida Ry. & Nav. Co., 19 L. D. 414.

<sup>7</sup> See, *ante*, §§ 158, 159.

§ 426. **Tailings.**—To suffer tailings to flow where they list, without obstructions to confine them, is equivalent to their abandonment.<sup>1</sup> If they lodge on the lands of another, they are considered as an accretion, and belong to him.<sup>2</sup> If they accumulate on vacant and unappropriated public land, it has been the custom in the mining regions of the west to recognize the right of the first comer to appropriate them by proceedings analagous to the location of placer claims.<sup>3</sup> As was said by the supreme court of Nevada. "Although not a mining claim within the strict meaning of the expression as generally used in this country, a 'tailings claim' is so closely analagous to it, that the propriety of subjecting the acquisition and maintenance of the possession of it to the rules governing the acquisition of the right to a strictly mining claim, at once suggests itself."<sup>4</sup>

The land department has recognized this possessory right, and permitted entries to be made of lands containing beds of tailings, under the laws applicable to placers. There are no adjudicated cases in the reports of department decisions which have come under our observation, but we have knowledge of several instances where patents for this class of claims have been issued under the mining laws.

§ 427. **Subterranean gravel deposits in ancient river beds.**—Subterranean channels of ancient streams into which beds of auriferous gravels have been deposited are sometimes called deep, or ancient, placers. The most noted of these are found in California.<sup>5</sup>

<sup>1</sup> Jones v. Jackson, 9 Cal. 238, 245.

<sup>2</sup> *Id.*

<sup>3</sup> Dougherty v. Creary, 30 Cal. 291.

<sup>4</sup> Rogers v. Cooney, 7 Nev. 213.

<sup>5</sup> For interesting and valuable discussion on the subject of these deep gravels, see, Monographs of Mr. Ross E. Browne, The Ancient River Beds of The Forest Hill Divide, Cal. State Mineralogist's Report, 1890, p. 435, and of Mr. John Hays Hammond, The Auriferous Gravels of California, in the report of 1889, p. 105.

These gravel beds lie upon a "bed-rock" which, at some period of geological history, formed the bed of an ancient river. They are usually immediately overlain by a formation of clay gouge, and on this clay covering is a capping of lava, sometimes hundreds of feet in thickness. These subterranean deposits are reached by means of tunnels to the bed-rock, and thence following the meanderings of the channel. These deposits certainly occupy a fixed position in the mass of the mountain, although they do not fall within the popular definition of lodes, or veins. The land department, at an early period, classified them as "placers," and patents have uniformly been issued upon locations made under the placer laws.<sup>1</sup>

The supreme court of California has upheld this classification.<sup>2</sup>

The inconvenience of this rule will be shown when we come to consider the requirements of the department as to discovery within the limits of each twenty-acre tract. But this is an argument which should address itself to congress, in order that this class of deposits may receive separate consideration, and be relieved from conditions which are not unreasonable when applied to superficial placers, but become exceedingly onerous and burdensome when applied to these subterranean deposits.

§ 428. **Beds of streams.**—As to whether gravel deposits lying on the beds of watercourses may be appropriated under the placer laws, will depend on circumstances. If the stream is navigable, certainly no right to appropriate its bed for mining purposes can be sanctioned, for two reasons:—

(1) The shores and beds of such rivers belong to the state, and not to the federal government. They were not granted by the constitution to the United States, but were reserved to the states respectively, and the new states have

<sup>1</sup> Com'rs' Letter, Copp's Min. Dec. 78.

<sup>2</sup> Gregory v. Pershbaker, 73 Cal. 109, 115.

the same rights of sovereignty and jurisdiction over this subject as the original states;<sup>1</sup>

(2) The conduct of mining operations in navigable streams is incompatible with the public uses to which such streams are dedicated.

If unnavigable, there is no reason why the gravel deposits lying on the beds cannot be appropriated<sup>2</sup> (as the banks can, for it is there that placers are usually found,) if the title to the bed resides in the general government. No subsequent appropriation of the bed of an unnavigable stream can interfere with the rights of the prior riparian proprietor. In other words, the question to be considered is, whether the bed sought to be appropriated is a part of the public domain, or not.

## ARTICLE II. THE LOCATION AND ITS REQUIREMENTS.

<p>§ 432. Acts necessary to be performed to constitute a valid placer location under the Revised Statutes, in the absence of supplemental</p>	<p>state legislation and local district rules.</p> <p>§ 433. Requisites of a valid placer location where supplemental state legislation exists.</p>
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**§ 432 Acts necessary to be performed to constitute a valid placer location under the Revised Statutes, in the absence of supplemental state legislation and local district rules.**—Generally speaking, the acts required to be performed in order to complete a valid location under the federal laws applicable to placers, are the same as are required in cases of lode locations. Section twenty-three hundred and twenty-nine of the Revised Statutes provides:—

“Claims usually called placers, including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent under like

<sup>1</sup> Pollard v. Hagan, 3 How. 212; Pollard's Heirs v. Kibbe, 9 How. 471; Commissioner Burdett's Letter, 1 Copp's L. O. 155.

<sup>2</sup> Rablin's Placer, 2 L. D. 764.

“circumstances and conditions as are provided for vein, “or lode, claims.”

This has been construed to mean:—

(1) That there must be a discovery upon which to base the location;<sup>1</sup>

(2) The location must be marked upon the ground so that its boundaries can be readily traced.<sup>2</sup>

As was said in a previous section, referring to lode claims, no notice need be posted, no particular kind of marking is required, nor is any record made necessary. No preliminary development work is prescribed. In the absence of supplemental state or local regulation the discovery and marking the boundaries perfect the location.<sup>3</sup>

**§ 433. Requisites of a valid placer location where supplemental state legislation exists.**—As in the case of lodes,<sup>4</sup> most of the states within the purview of this treatise have enacted laws prescribing certain acts to be done, in order to perfect a placer location, in addition to the requirements of the federal law. These supplemental provisions vary in the different states. Taking the Colorado statutes as a type (although the laws of some of the states are more elaborate), the following acts are required to complete a location of this class:—

- (1) Discovery;
- (2) Posting a notice of location;
- (3) Marking the boundaries in a specified manner;
- (4) Recording a certificate of location.

As these features are common to both lode and placer claims, what we have heretofore said with reference to the

<sup>1</sup>McDonald v. Montana Wood Co., 14 Mont. 88; Lincoln Placer, 7 L. D. 81; Ferrell v. Hoge, 18 L. D. 81; 19 L. D. 568; Louise M. Co., 22 L. D. 409; Rhodes v. Treaz, 21 L. D. 503; S. P. R. R. v. Griffin, 20 L. D. 663; Reins v. Murray, 22 L. D. 409; Union Oil Co., 23 L. D. 222.

<sup>2</sup>White v. Lee, 78 Cal. 593; Sweet v. Webber, 7 Colo. 443; Anthony v. Jillson, 83 Cal. 296; McDonald v. Montana Wood Co., 14 Mont. 88.

<sup>3</sup>See, *ante*, § 328.

<sup>4</sup>See, *ante*, § 329.



necessity of complying with these conditions,<sup>1</sup> the order in which the acts may be performed,<sup>2</sup> and the effect of locations made by agents,<sup>3</sup> need not be here repeated.

### ARTICLE III. THE DISCOVERY.

§ 437. Rules governing discovery the same as in lode locations.	§ 438. Unit of placer locations—Discovery in each twenty-acre tract.
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**§ 437. Rules governing discovery the same as in lode locations.**—The subject of discovery has been fully considered, when dealing with lode locations, in a previous article.<sup>4</sup> The principles there announced apply with equal force to placers, in so far as the character of the deposits will admit. Discovery is just as essential in case of placers as it is in lode locations, and the rules as to what constitutes a valid discovery in the latter apply with equal force to the former, with such modifications only as necessarily flow from the different form in which the deposits occur. It is, therefore, useless to repeat what has heretofore been fully explained.

According to a ruling of the department, the fact that land has been returned as mineral by the surveyor-general does not obviate the necessity of a discovery as the basis of a placer location. Without such discovery the location is void.<sup>5</sup>

**§ 438. Unit of placer locations—Discovery in each twenty-acre tract.**—We have heretofore observed that the unit of lode locations is a surface area aggregating a fraction over twenty acres, and that it is immaterial how many or how few locators participate in that class of locations.<sup>6</sup>

We shall see in a succeeding article that the rule in regard to placers is somewhat different. In placers, the

<sup>1</sup> See, *ante*, § 329.

<sup>2</sup> See, *ante*, § 330.

<sup>3</sup> See, *ante*, § 331.

<sup>4</sup> See, *ante*, §§ 335-339.

<sup>5</sup> *Reins v. Murray*, 22 L. D. 409.

<sup>6</sup> See, *ante*, § 361.

unit of the location is twenty acres to each individual, with a maximum of one hundred and sixty acres to an association of persons. In other words, unless limited by local rules,<sup>1</sup> a single individual may locate a twenty-acre tract, but no more. Where more than one person (not exceeding eight) participates, an area equivalent to twenty acres to each is permitted; but they locate the whole area jointly, and are not, according to the practice, required to each locate a particular specified twenty-acre tract, becoming tenants in common of the entire area. Such being the case, the question has arisen as to whether one discovery within the limits of the entire area appropriated by an association of persons would be sufficient upon which to base a location as to such area, or whether a discovery is necessary upon each twenty-acre tract or unit of location. In case of lode locations, where an appropriation in excess of the statutory limit of a single location is desired, a separate discovery and separate location are necessary.<sup>2</sup>

In applying the law to this class of cases, the rule adopted by the land department seems to be now well settled. As stated by Secretary Smith, it is as follows:—

“It will be conceded, that the individual is required to  
“make a discovery on the twenty acres he is permitted  
“to take. This being true, it is difficult to conceive  
“of a construction of the law that would discriminate  
“against the individual in favor of the many. Such was  
“surely not the intention of the law-makers. In my opinion,  
“there must be a discovery upon each twenty-acre  
“tract included in a placer location of one hundred and  
“sixty acres, and a location made of that amount of land  
“upon a single discovery is made void, except as to the  
“twenty acres immediately surrounding it. To construe  
“the law otherwise, is to open the doorway for the  
“appropriation of the public lands, that would be doing  
“great violence to the intent and meaning of the mining  
“law.”<sup>3</sup>

<sup>1</sup> Copp's Min. Dec. 164.

<sup>2</sup> See, *ante*, § 361.

<sup>3</sup> Ferrell v. Hoge, 18 L. D. 81.

That this has not always been the rule, the department itself admits,<sup>1</sup> but all the recent decisions of that department promulgated during the incumbency of Secretary Smith follow the views above expressed.<sup>2</sup>

In one of the decisions of the supreme court of California, there is found the following *dictum*: "It is insisted by counsel for respondents, that no location of mineral land is valid unless valuable mineral had been actually discovered in the land before the location was made. As to placer claims, we find no such condition in the acts of congress, in the local laws, or in the practice of miners."<sup>3</sup>

We characterize this as *dictum*, because the court in the next sentence finds, that in the case under consideration there was a discovery.

At all times in the history of mining in the west, discovery was recognized as the source of mining titles,<sup>4</sup> without distinction as to the character of the deposit,<sup>5</sup> and we do not think the supreme court of California intended to overthrow this doctrine.

The supreme court of Montana does not agree with the rule established by the land department. It has held, that a single discovery within the limits of a tract of one hundred and sixty acres, located by an association of eight persons, is sufficient upon which to base a location of the entire tract.<sup>6</sup>

Secretary Smith's attention was invited to this decision, but he declined to accept it as a correct exposition of the law.<sup>7</sup>

There is this to be said in favor of the departmental ruling: In placer entries, the department must be satisfied as to the mineral character of the entire tract. There is

<sup>1</sup> Ferrell v. Hoge (on review), 19 L. D. 568. See, also, Lincoln Placer, 7 L. D. 81.

<sup>2</sup> S. P. R. R. v. Griffin, 20 L. D. 485; Rhodes v. Treas., 21 L. D. 502; Louise M. Co., 22 L. D. 663; Union Oil Co., 23 L. D. 222.

<sup>3</sup> Gregory v. Pershbaker, 73 Cal. 109, 117.

<sup>4</sup> Jackson v. Ruby, 109 U. S. 440.

<sup>5</sup> See, *ante*, § 335.

<sup>6</sup> McDonald v. Montana Wood Co., 14 Mont. 88.

<sup>7</sup> Ferrell v. Hoge (on review), 19 L. D. 568.

no legal inference, that because a given twenty-acre tract within an area of one hundred and sixty acres is mineral in character, that the adjoining tracts, or others more remote, are of the same character.<sup>1</sup> And we cannot conceive how this essential fact can be established without showing a discovery within each tract.

The ruling of the land department, however, is not altogether consistent with decisions upon other requirements of the law. If the theory upon which the rule rests is the correct one, it would follow, that each twenty-acre tract should be marked upon the ground, and that, prior to patent, the equivalent of five hundred dollars in labor or improvements must be shown to have been expended for the benefit of each twenty acres; that is, an aggregate of four thousand dollars for one hundred and sixty acres.

This, according to Secretary Smith, would be required in the case of eight contiguous lode claims.<sup>2</sup>

But in case of placers, it seems that the expenditure of five hundred dollars alone will be sufficient to carry to patent any extent of contiguous area that may be embraced in the application.<sup>3</sup>

It is not our present intention to discuss the correctness of either of the two propositions last announced. This will be reserved for discussion when dealing with the patent proceedings. We cite them simply to show the inconsistency existing between the two classes of rulings.

While the supreme court of Montana may be right in its theory that one discovery is sufficient to hold one hundred and sixty acres of placer ground when located in the names of eight persons, it is quite manifest that its decision does not control the land department. As the courts cannot interfere with that department while in the discharge of its duties in disposing of the public lands, either by injunction or mandamus,<sup>4</sup> or exercise any direct appellate

<sup>1</sup> *Dughi v. Harkins*, 2 L. D. 721. Quoted in *Davis v. Weibbold*, 139 U. S. 507.

<sup>2</sup> *Sweeney v. N. P. R. R.*, 20 L. D. 394; *Ferguson v. Hanson*, 21 L. D. 336.

<sup>3</sup> *Good Return P. M. Co.*, 4 L. D. 221.

<sup>4</sup> *Marquez v. Frisbie*, 101 U. S. 473; *Litchfield v. Richards*, 9 Wall. 575; *Games v. Thompson*, 7 Wall. 347; *Cox v. McGarrahan*, 9 Wall. 298.

jurisdiction for the purpose of reversing or correcting its errors,<sup>1</sup> it is safer to assume the correctness of its rulings in this respect, at least, than to insist upon a contrary doctrine. In ordinary placer claims, it is by no means difficult to comply with the rule established by the department.

In the case of deep placers, some inconvenience will be encountered,<sup>2</sup> but no more so than to establish the mineral character of the land containing this class of deposits for purposes of final entry and patent.

#### ARTICLE IV. STATE LEGISLATION AS TO POSTING NOTICES AND PRELIMINARY DEVELOPMENT WORK.

§ 442. State statutes requiring posting of notices on placers.

§ 443. Preliminary development work required by state laws upon placer locations.

**§ 442. State statutes requiring posting of notices on placers.**—The general observations upon the subject of posting notices following lode discoveries, found in a preceding section,<sup>3</sup> apply with equal force to all classes of locations upon the public mineral lands. With the exception of the common custom generally observed, as there indicated, the posting of a notice is the subject of state or local regulation, in the absence of which none is required.

Some of the states have enacted laws upon the subject with regard to placers, a brief epitome of which will not be out of place:—

*Colorado.*—Before recording (thirty days from discovery) the discoverer must post upon the claim a notice containing: (1) the name of the claim; (2) the name of the locator; (3) date of discovery, and (4) number of feet or acres claimed.<sup>4</sup>

<sup>1</sup> *Quinby v. Coulan*, 104 U. S. 420; *Shepley v. Cowan*, 91 U. S. 330.

<sup>2</sup> *Louise M. Co.*, 22 L. D. 663.

<sup>3</sup> See, *ante*, § 350.

<sup>4</sup> *Mills' Annot. Stats.*, § 3136.

*California.*—The discoverer must immediately post, in a conspicuous place at the point of discovery, a notice or certificate of location containing: (1) the name of the claim; (2) the name of the locator or locators; (3) date of discovery and posting of notice, which shall be considered as the date of location; (4) a description of the claim, by reference to legal subdivisions of sections, if the location is made in accordance with the public surveys; otherwise, a description with reference to some natural object or permanent monument as will identify the claim.<sup>1</sup>

*Idaho.*—Requirements are practically the same as in lode claims.<sup>2</sup>

*Montana.*—The same as in lode claims, except that the number of feet or acres claimed must be designated in the notice, instead of the length of the lode.<sup>3</sup>

*Wyoming.*—Provisions are the same as in Colorado.<sup>4</sup>

As to Arizona and New Mexico, if any notice is required to be posted, it is the same as in case of lode claims.<sup>5</sup> Placers are not specially named in the laws of either of these territories upon the subject of posting notices, and it is doubtful if they were intended to apply to placer locations.

We find no provisions on this subject in either Washington, Utah, South Dakota, Oregon, North Dakota, or Nevada.

**§ 443. Preliminary development work required by state laws upon placer locations.** — When speaking of the requirement of preliminary development work with respect to lode locations, we expressed the view that the object was two-fold:—

- (1) To determine the lode character of the deposit;
- (2) To compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws.<sup>6</sup>

<sup>1</sup> Act of March, 1897, § 4.

<sup>2</sup> Laws of 1895, p. 25, §§ 1, 12. See, *ante*, § 354.

<sup>3</sup> Rev. Code 1895, § 3610. See, *ante*, § 352.

<sup>4</sup> Laws of 1888, pp. 89-90, § 22.

<sup>5</sup> See, *ante*, § 353.

<sup>6</sup> See, *ante*, § 344.

It is quite obvious that both of these reasons cannot be offered in support of similar requirements in cases of placers, although the latter applies with equal force to them. But three of the states, however, have attempted any legislation on this subject with respect to placers.

California requires, that within sixty days from the date of discovery, the discoverer shall perform labor upon his claim in developing it, to an amount equivalent to at least ten dollars' worth for each twenty acres, or fractional part thereof. A failure to perform such labor within the time shall work a forfeiture of all rights under such location, and open the land to location by any qualified locator, except the previous locators.<sup>1</sup>

In Idaho<sup>2</sup> and Montana,<sup>3</sup> the equivalent of the work done upon lode claims must be done upon placers.

The remaining states and territories have passed no laws upon the subject

It must be remembered, that these requirements are not necessarily connected with the annual labor required by the laws of congress. While this preliminary development work might reasonably be considered in estimating the value of the annual labor for the first year next succeeding the date of location, its requirement is one of the acts of location, and we think such legislation is clearly within the power of the states.

#### ARTICLE V. THE SURFACE COVERED BY THE LOCATION — ITS FORM AND EXTENT.

§ 447. Form and extent of placer locations prior to Revised Statutes.

§ 448. Form and extent under Revised Statutes.

§ 449. Placer locations by corporations.

§ 450. Locations by several persons in the interest of one  
Number of locations by an individual.

**§ 447. Form and extent of placer locations prior to Revised Statutes.**—Previous to the act of July 9, 1870,

<sup>1</sup> Act of March, 1897, § 4.

<sup>2</sup> Laws of 1895, p. 25, § xii.

<sup>3</sup> Rev. Code, 1895, § 3611.



commonly known as the "placer law," congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of mining claims, was determined by rules and regulations established by miners themselves.<sup>1</sup> The size and shape varied according to the nature of the deposit, for in those days this class of claims embraced hydraulic "dig-gings," gulch or ravine claims, creek claims, and claims on bars and flats.<sup>2</sup> Locations of these claims were made without regard to the lines of public surveys, as there were none.

The placer law of 1870,<sup>3</sup> provided for the patenting of placer claims under like circumstances and conditions as were provided by the lode law of 1866 for vein, or lode, claims. It was required, however, that where locations were made upon surveyed lands, the entry in its exterior limits was required to conform to the legal subdivisions of the public lands. For this purpose, it was provided that forty-acre tracts might be subdivided into areas of ten acres, but no location thereafter to be made was permitted to exceed one hundred and sixty acres for any one person or association of persons.

Locations made prior to this act might, if located in conformity with local rules, be patented, whatever their form or area,<sup>4</sup> and any number of contiguous claims, of any size, might be purchased, consolidated, and applied for as one entry.<sup>5</sup>

Under this act, any one person might, unless inhibited by local rules, locate one hundred and sixty acres. An association of persons was limited to a like area.

The general mining act of May 10, 1872,<sup>6</sup> modified the original placer law by fixing the limit of twenty acres for

<sup>1</sup> St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 649.

<sup>2</sup> Yale on Mining Claims and Water Rights, 76, 77.

<sup>3</sup> 16 Stats. at Large, 217.

<sup>4</sup> Copp's Min. Dec. 40.

<sup>5</sup> St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 651.

<sup>6</sup> 17 Stats. at Large, p. 91, § 10.

each individual claimant. The limit which might be taken by an association of persons remained the same, as in this respect the act of 1870 was unrepealed.<sup>1</sup>

As to the form of the location, the later act provided that it should conform *as near as practicable* with the United States system of public land surveys and the rectangular subdivisions of such surveys; where it could not be conformed to legal subdivisions, it might be made the same as on unsurveyed lands. This was the state of the law when the federal statutes were revised.

**§ 448. Form and extent under Revised Statutes—**

The Revised Statutes, which embrace the laws of the United States general and permanent in their nature, in force on December 1, 1873, contain the following provisions as to form and extent of surface area:—

“§ 2329. Claims usually called ‘placers,’ including  
“all forms of deposit, excepting veins of quartz, or other  
“rock in place, shall be subject to entry and patent, under  
“like circumstances and conditions, and upon similar proceedings, as are provided for vein, or lode, claims; but  
“where the lands have been previously surveyed by the  
“United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

“§ 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person, or association of persons, which location shall conform to the United States surveys.

“§ 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular

<sup>1</sup>See, *ante*, § 72; *St. Louis Smelting Co. v. Kemp*, 21 Fed. Cases, 205.

“ subdivisions of such surveys, and no such location shall  
“ include more than twenty acres for each individual  
“ claimant; but where placer claims cannot be conformed  
“ to legal subdivisions, survey and plat shall be made as  
“ on unsurveyed lands; and where by the segregation of  
“ mineral lands in any legal subdivision a quantity of  
“ agricultural land less than forty acres remains, such frac-  
“ tional portions of agricultural land may be entered by  
“ any party qualified by law, for homestead or pre-emption  
“ purposes.”

It will thus be observed:—

- (1) That the unit or individual location is twenty acres;
- (2) That not to exceed one hundred and sixty acres may be embraced within one location by an association of persons, of which there must be at least eight;
- (3) That the location, if upon surveyed lands, must conform as near as practicable to the lines of the public surveys.

As to whether it is practicable to make a location or survey conform to legal subdivisions, is a matter which rests entirely with the land department.

Commissioner McFarland held, that the only construction of the language of the act, “as near as practicable,” which is consistent with the context of the act and the general intention of congress is, that placer locations upon surveyed lands must conform to the public surveys in all cases, except where this is rendered impossible by the previous appropriation or reservation of a portion of the legal subdivision of ten acres upon which the claim is situated. The location in this case was made in 1880, and covered the bed of Bear river, in California, for twelve thousand feet, following the meanderings of the river, and embraced a small quantity of surface ground along its banks. The entry was held for cancellation.<sup>1</sup>

This ruling of the commissioner, however, was reversed by Secretary Teller,<sup>2</sup> who held, that the placer law of 1870, which expressly required placer locations to conform to

<sup>1</sup> 10 Copp's L. O. 3. See, also, Copp's Min. Lands, 115.

<sup>2</sup> Rablin's Placer, 2 L. D. 764; Esperance M. Co., 10 Copp's L. O. 338.

the lines of the public surveys, was unreasonable, a hardship, and in contravention of the established custom of the mining regions; therefore, it was modified by the act of May 10, 1872, so as to provide for exceptional cases where reason and common sense required a different regulation.

The case of the Bear river claim was of this exceptional character. The placer deposit was in a cañon on the banks of a very crooked stream, and where the adjoining lands were totally unfit for mining or agricultural purposes. The placer applicant was permitted to proceed to patent.

There can be no question but that this ruling is in harmony with the custom of miners in California. This particular river was, from 1852 to 1867, the scene of great mining activity, and for miles up and down the stream, during the season when the stage of the water would permit, miners claimed, occupied, and worked its bed, bars, and banks, under regulations defining the extent of their claims by a certain number of feet along the stream, and a width extending to the sides of the gulch.

The ruling of Secretary Teller was followed in a later case by acting Secretary Muldrow.<sup>1</sup>

While it is true that congress is not bound to shape its legislation so as to conform to the previously existing local customs, yet the history of federal mining legislation shows that great consideration has been paid to such customs. Evidently, there was some reason for the modification of the original placer act in this respect, and there can be no doubt that Secretary Teller states the "old law, the "inischief, and the remedy" correctly.

These gulch or river claims, as well as deep placers found in ancient river beds where the deposits follow the meanderings of the channel, certainly present instances where it would be unreasonable in all cases to insist that a mining claimant should take and pay for, at an increased rate, any considerable amount of land that is useless for mining purposes, for the sake of obtaining title to the

<sup>1</sup> *In re Pearsall and Freeman*, 6 L. D. 227.

small quantity which is useful.<sup>1</sup> The inconvenience to the government in administering its land system is no greater in this respect than that caused by the segregation of lode claims.<sup>2</sup>

Lands must be treated as unsurveyed until the plat is finally approved.<sup>3</sup>

Locations upon unsurveyed lands may be made in any form so long as the statutory area is not exceeded.

§ 449. **Placer locations by corporations.**—As heretofore noted,<sup>4</sup> the supreme court of the United States has determined, that a domestic corporation formed under the laws of a state may locate public mineral lands, but intimates that there may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer, suggesting that it might perhaps be treated as one person and entitled to locate only to the extent permitted a single individual.<sup>5</sup>

The placer law quoted in the preceding section permits an “association of persons” to locate not to exceed one hundred and sixty acres. A corporation is an association of persons; at the same time we must admit that it is but an artificial individual. We have intimated in a previous section, that if such a corporation had a constituency of eight stockholders it might be permitted to appropriate one hundred and sixty acres of land by location. We are not aware that the question has ever been judicially determined. Looking at the object of the statute in permitting consolidation of interests for purposes of development and operation, so clearly outlined by the supreme court of the United States in *St. Louis Smelting Company v. Kemp*,<sup>6</sup>

<sup>1</sup> *Esperance Mining Claim*, 10 Copp's L. O. 338.

<sup>2</sup> For illustration of manner of describing minor subdivisions located as placers, see, *Mining Circular*, Dec. 10, 1891, pars. 56, 57. See appendix.

<sup>3</sup> Copp's Min. Dec., 41. See, *ante*, §§ 104, 105, 142; *Bullock v. Rouse*, 81 Cal. 590, 595; *Medley v. Robertson*, 55 Cal. 396.

<sup>4</sup> See, *ante*, § 226, p. 274.

<sup>5</sup> *McKinley v. Wheeler*, 130 U. S. 630, 636.

<sup>6</sup> 104 U. S. 636.

we cannot say that by the use of the term "association of persons" congress meant to exclude corporations from the designation. As eight individuals might locate and unite their interests in an incorporated company without violating the spirit of the law, it is not unreasonable to suggest, that a corporation composed of the eight may accomplish the same purpose by locating one hundred and sixty acres. Our suggestion is based upon the language of the statute. In the absence of any such provision granting privileges to an association of persons, undoubtedly a corporation would simply occupy the status of an individual. The question is not by any means easy of solution. It has not been judicially answered.

§ 450. **Locations by several persons in the interest of one—Number of locations by an individual.**—It is a matter of frequent occurrence, that an individual locator, desiring to obtain more ground than he is permitted under the law to appropriate in his individual capacity by a single location, resorts to the use of "dummies," and perfects locations in their names, subsequently obtaining conveyances therefor. The courts have held that this is a fraud upon the government.<sup>1</sup> The same object can be accomplished without violating the law. There is nothing to prevent a miner from locating, by separate location, as many twenty-acre tracts as he pleases, either contiguous or non-contiguous. The right to locate and develop mining ground is not exhausted by a single location, as in the case of pre-emption and homestead entries. If he can discover mineral within the eight twenty-acre subdivisions of a quarter section of land, and is willing to develop them to the extent required by law as a condition precedent to the acquisition of title by patent, or to annually perform labor to the extent required by law upon, or for the benefit of, each, he is clearly entitled to do so. The statute simply inhibits the acquisition by an individual of more than

<sup>1</sup> *Mitchell v. Cline*, 84 Cal. 400; *Gird v. California Oil Co.*, 60 Fed. 535.



twenty acres by a single location. During the period when rights were governed exclusively by local rules, in certain districts the number of claims which one might locate and hold at one time within that particular district were defined. But there is no trace of this found in the legislation of congress.

## ARTICLE VI. THE MARKING OF THE LOCATION ON THE GROUND.

§ 454. Rule as to marking boundaries of placer claims in absence of state legislation.

§ 455. State legislation as to marking boundaries of placer claims.

**§ 454. Rule as to marking boundaries of placer claims in absence of state legislation.**—We have explained in a previous section the necessity for, and object of, marking lode locations upon the ground.<sup>1</sup> While the surface boundaries of a placer claim do not perform all the functions of end and side lines of lode locations, nevertheless the marking of a placer location on the ground is just as essential as in the case of lodes. Where the location is upon unsurveyed land, or if upon surveyed land is of such a character that it is not required to conform to the public surveys,<sup>2</sup> it has never been doubted but that this all-important act of location should be performed, and that such locations should be marked with the same care as in lode locations. Where, however, placer ground is located according to subdivisions of the public surveys, it has been contended that such marking is not necessary, and that a description in the posted or recorded notice by fractional subdivisions of the section, designating the township and range, serves the purpose of the law, and dispenses with this requirement as to marking on the ground.

This view has found support in a decision by Assistant Secretary Reynolds, wherein he holds, referring to the

<sup>1</sup>See, *ante*, § 371.

<sup>2</sup>See, *ante*, § 448.



language of section twenty-three hundred and twenty-nine of the Revised Statutes, that the "like circumstances and "conditions" apply to discovery, location, and *where the location is made on unsurveyed lands*, marking the boundaries of the same, as of a lode claim.

He says: "It does not, in my judgment, mean that "when the placer is located on surveyed lands it is necessary to mark the boundaries. There is no purpose that "can be subserved by so doing. The public surveys are "as permanent and fixed as anything can be in that line, "and any fractional part of a section can be readily found, "and its boundaries ascertained, by that method, for all "time to come, and is necessarily more stable and enduring than marking it by perishable or destructible stakes "or monuments."<sup>1</sup>

The supreme court of Montana inclines to the same view.<sup>2</sup>

But it seems to us that these decisions overlook several important matters:—

(1) In the absence of any state legislation or local rule, no notice need be either posted<sup>3</sup> or recorded.<sup>4</sup> What evidence is there on the ground, or elsewhere, of any appropriation which will warn off subsequent intending locators, if there are no marks to indicate it?

(2) Minor subdivisions are not surveyed in the field, but are protracted in the surveyor-general's office on the township plats, and the lines are wholly imaginary.<sup>5</sup>

It seems to us that the supreme court of California presents the logical view of the law. Said that court:—

"The construction contended for does not seem to us to "be in harmony with the general purpose of the act. The "purpose of the requirement, that the claimant shall mark "the boundaries of his claim, is to inform other miners as "to what portion of the ground is already occupied. The "men for whose information the boundaries are required

<sup>1</sup> *Reins v. Murray*, 22 L. D. 409.

<sup>2</sup> *Freezer v. Sweeney*, 8 Mont. 508.

<sup>3</sup> See, *ante*, § 350.

<sup>4</sup> See, *ante*, § 273.

<sup>5</sup> See, *ante*, § 106, p. 120.

“to be marked, wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter-section of a particular number had been taken up. They would derive no more information from it than they would from a description by metes and bounds, such as would be sufficient in a deed. For the information of these men, it is required that the boundaries shall be ‘distinctly marked upon the ground.’ The section lines may not have been ‘distinctly’ marked upon the ground, or the marks may have become obliterated by time or accident. And to say, that the mere reference to the legal subdivision is of itself sufficient, would, in our opinion, defeat the purpose of the requirement.”<sup>1</sup>

The views of the supreme court of Colorado are in harmony with those of the California courts.<sup>2</sup>

The supreme court of Montana has held, that a separate marking of the boundaries as to each twenty-acre tract within a larger area, located by an association of persons, is not necessary. It is sufficient if the exterior boundaries of the larger area be marked.<sup>3</sup>

We think we are justified in the conclusion, that placer locations must be marked on the ground with the same care, and for the same object and purpose, as in case of lode locations.

**§ 455. State legislation as to marking boundaries of placer claims.**—There is no legislation on the subject of marking placer locations in either Oregon, Nevada, South Dakota, North Dakota, Washington, or Utah. As to Arizona and New Mexico, it is difficult to determine whether their laws were intended to apply to placers, or not. Of course, the necessity for marking arises from the terms of federal law. State or territorial legislation may determine the character of marking within reasonable limits, but cannot dispense with the requirement of the federal laws.

<sup>1</sup> *White v. Lee*, 78 Cal. 593, 596; followed in *Anthony v. Jillson*, 83 Cal. 296.

<sup>2</sup> *Sweet v. Webber*, 7 Colo. 443.

<sup>3</sup> *McDonald v. Montana Wood Co.*, 14 Mont. 88.

Colorado requires the boundaries to be marked prior to recording the certificate of location (thirty days from discovery) by placing a substantial post at each angle of the claim.<sup>1</sup>

California allows thirty days from date of discovery to complete the marking, "so that its boundaries can be readily traced."<sup>2</sup>

Idaho<sup>3</sup> and Montana<sup>4</sup> require the same marking as in case of lode claims.

Wyoming requires surface boundaries to be designated before recording the location certificate (ninety days from discovery), by substantial posts or stone monuments at each corner of the claim.<sup>5</sup>

#### ARTICLE VII. THE LOCATION CERTIFICATE AND ITS RECORD.

§ 459. State legislation concerning location certificates and their record.

§ 459. State legislation concerning location certificates and their record.—As in the case of lodes, certificates of location<sup>6</sup> and their record<sup>7</sup> are the subject of state or local regulation. Where such certificates are required, and their record is provided for, the same general rules apply as in the case of lodes. Where a record is made necessary, the requirements of the federal law as to contents of such record are mandatory.<sup>8</sup> There are no specific provisions on the subject in either Washington, Utah, South Dakota, North Dakota, Oregon, Nevada, Arizona, or New Mexico. It is possible that in the two territories and in Nevada the laws governing lode claims may be construed to cover placers, but it is extremely doubtful if such is the case. Other states make special provision for this class of cases.

<sup>1</sup> Mills' Annot. Stats., § 3136.

<sup>2</sup> Act of March, 1897, § 4.

<sup>3</sup> Laws of 1895, p. 25, § xii.

<sup>4</sup> Rev. Code 1895, § 3611.

<sup>5</sup> Laws of 1888, pp. 88-90, § 22.

<sup>6</sup> See, *ante*, § 379.

<sup>7</sup> See, *ante*, §§ 273, 328.

<sup>8</sup> See, *ante*, § 273.

*Colorado.*—Within thirty days from the discovery a certificate of location must be recorded in the county recorder's office, which must contain: (1) the name of the claim designating it as a placer; (2) name of locator; (3) date of location; (4) number of acres or feet claimed; (5) description of claim by reference to natural objects or permanent monuments.<sup>1</sup>

*California.*—Within thirty days from the date of discovery, the discoverer shall record the notice, or certificate of location (which must be similar to the posted notice),<sup>2</sup> in the office of the county recorder of the county in which the discovery is made.<sup>3</sup>

*Idaho.*—Every placer claim must be recorded within thirty days from the time of location, in the district in which the same is situated, or in the office of the county recorder. The location notice must contain: (1) date of location; (2) name of locator; (3) name and dimensions of the claim; (4) such description of locality, by reference to natural landmarks or fixed objects and contiguous claims, if any, as to render the situation of the same reasonably certain from the letter of the notice itself. An affidavit of one of the locators must be attached.<sup>4</sup>

*Wyoming.*—Within thirty days after date of discovery, the location certificate must be recorded with the district recorder, if there be one, and within ninety days from such discovery a record must be made with the county recorder. The certificate must contain: (1) the name of the claim, designating it as a placer; (2) the name of the locator; (3) date of location; (4) number of feet or acres claimed; (5) a description of the claim by designation of such natural or fixed objects as shall identify the claim beyond question.<sup>5</sup>

*Montana.*—The requirements in Montana are substantially the same as in case of lode locations,<sup>6</sup> substituting

<sup>1</sup> Mills' Annot. Stats., § 3136.

<sup>2</sup> See, *ante*, § 380.

<sup>3</sup> Act of March, 1897, § 4.

<sup>4</sup> Laws of 1895, p. 25, §§ xii., xiii.

<sup>5</sup> Laws of 1888, pp. 89-90, § 22.

<sup>6</sup> See, *ante*, § 380, p. 493.

the number of superficial feet or acres claimed in place of the number of linear feet and surface area embracing the lode.<sup>1</sup>

#### ARTICLE VIII. CONCLUSION.

§ 463. General principles announced in previous chapter on lode locations apply with equal force to placers.

§ 463. General principles announced in previous chapter on lode locations apply with equal force to placers.—

The architecture of existing mining legislation is a composite of incongruous elements—an aggregation of piece-work, which does not present, in outline, that symmetrical form or structure which commends itself to the professional eye. There is a total lack of harmonious blending, and it is often difficult to determine what provisions of the law apply distinctively to lode locations, and what to placers; or what, in contemplation of law, is to be applied to both.

The laws governing both classes had a common origin, and during the period when local rules and customs held sway the only difference between them was as to the extent of property rights enjoyed, and such modified regulations as were required by the difference in the form in which the deposits occurred. But discovery and appropriation were the sources of the miner's title, and continuous development the condition of its perpetuation in the case of both lodes and placers. Congress manifestly recognized these as the basis of its mining legislation, and as a rule the courts have applied the general underlying principles applicable to one class of locations to the other, so far as the nature of the deposits would permit.

The previous chapter on the subject of lode locations, dealing with the location and its requirements, the discovery, the manner of locating, the marking of the boundaries, the changing of these boundaries, and amendment to location certificates, the relocation of forfeited or abandoned

<sup>1</sup> Rev. Code, 1895, § 3612.

claims, applies in the main to placers, except in so far as the nature of placer deposits obviously demand a discrimination. There is no extralateral right attached to a placer claim pure and simple. Therefore, the laws as they are construed by the courts, with reference to end and side lines and the pursuit of veins beyond vertical planes drawn through surface boundaries, have no reference to placers.

For the purpose of systematic treatment, owing to certain peculiar attributes pertaining to lode locations, it was necessary to consider the two classes and their mode of appropriation separately. But there are many things in common between them, as we think will be readily observed by a consideration of this and the two preceding chapters. Unnecessary repetition should, in our judgment, be avoided.

## CHAPTER IV.

### TUNNEL CLAIMS.

#### ARTICLE I. INTRODUCTORY.

##### II. MANNER OF PERFECTING TUNNEL LOCATIONS.

##### III. RIGHTS ACCRUING TO THE TUNNEL PROPRIETOR BY VIRTUE OF HIS TUNNEL LOCATION.

#### ARTICLE I. INTRODUCTORY.

§ 467. Tunnel locations prior to the enactment of federal laws.

§ 468. The provisions of the federal law.

§ 467. **Tunnel locations prior to the enactment of federal laws.**—Tunnel locations, or as they are sometimes called, "tunnel sites," occupy a unique position in practical mining upon the public domain. They were not unknown during the period antedating the enactment of congressional mining laws. The discovery of a new mineral belt frequently gave birth to local rules upon the subject of tunnels, and it was by no means an uncommon occurrence for tunnel locations to be made on the four slopes of a mountain, their projected lines running into the hill from every conceivable point of the compass, and at different elevations above the mountain's base, from one hundred to several thousand feet. The practical development of the mines was, as a rule, from surface discoveries on the crest of the mountain, or its benches and sloping ridges. Strife or litigation between surface locators and tunnel proprietors rarely, if ever, arose, for the simple reason, that according to the popular view, priority of discovery, whether from the surface or in the tunnel, established a priority of



right. In many localities, the life of the camp was short, and most of the tunnel projects began and ended with the staking of a line, the incorporation of a company with a fabulous capital, and the tunnel bore barely entering under cover.

We think it may be fairly stated, that prior to any legislation upon the subject by congress, in popular estimation the purpose of a tunnel location was that of discovery of blind veins, or deposits, whose existence it might be difficult, if not impossible, to establish by surface exploration, and that such discovery, by means of the tunnel, should be treated as the equivalent of one made from the surface. As to questions of priority, it was a mere race of diligence. Rights upon the discovered lode dated from the discovery in the tunnel, and not from the date of the tunnel location. Surface prospecting within the vicinity of the projected tunnel line was not inhibited. The chances of a successful discovery in many formations was largely in favor of the tunnel method, and this was the inducement for projecting it; but the tunnel locator's privilege was not understood to be an exclusive one within any defined surface area. We do not assert that this was the universal rule, or that it was of such a general observance as to lead to the inference that congress had it in mind when it legislated upon the subject. We do not know that is the fact. We have strong convictions upon the subject, but it would be difficult to assert, that in construing congressional legislation, as we are about to do, these antecedent conditions, popular theories, and local experiences should, or could, legally be resorted to as an aid of interpretation. We must take the statute as we find it, and construe it according to ordinary rules of interpretation.

§ 468. **The provisions of the federal law.** — We are not at present concerned with the act of congress of February 11, 1875,<sup>1</sup> providing that development work performed in running a tunnel shall be estimated as work done upon

<sup>1</sup> 18 Stats. at Large, 315.

the lodes with like effect as if done from the surface. This act has no particular bearing upon the subject now under consideration. We are now called upon to construe section four of the act of May 10, 1872, which is embodied in the Revised Statutes, and is as follows:—

“ § 2323. Where a tunnel is run for the development  
“ of a vein, or lode, or for the discovery of mines, the own-  
“ ers of such tunnel shall have the right of possession of  
“ all veins, or lodes, within three thousand feet from the  
“ face of such tunnel on the line thereof, not previously  
“ known to exist, discovered in such tunnel, to the same  
“ extent as if discovered from the surface; and locations  
“ on the line of such tunnel of veins, or lodes, not appear-  
“ ing on the surface, made by other parties after the com-  
“ mencement of the tunnel, and while the same is being  
“ prosecuted with reasonable diligence, shall be invalid;  
“ but failure to prosecute the work on the tunnel for six  
“ months shall be considered as an abandonment of the  
“ right to all undiscovered veins on the line of such tunnel.”

## ARTICLE II. MANNER OF PERFECTING TUNNEL LOCATION.

- |                                    |                                  |
|------------------------------------|----------------------------------|
| § 472. Acts to be performed in ac- | § 474. "Face" of tunnel defined. |
| quiring tunnel rights.             | § 475. The marking of the tunnel |
| § 473. "Line" of tunnel defined.   | location on the ground.          |

§ 472. Acts to be performed in acquiring tunnel rights.—The statute is silent as to the manner in which a tunnel location is perfected. The subject is regulated entirely by rules prescribed by the commissioner of the general land office, under the direction of the secretary of the interior, the authority for such regulation being found in the provisions of the Revised Statutes.<sup>1</sup> These rules, prescribed in pursuance of such authority, become a mass of that body of public records, of which the courts take judicial notice,<sup>2</sup> and when not repugnant to the acts of congress have the force and effect of laws.<sup>3</sup>

<sup>1</sup> § 2478.

<sup>2</sup> *Caha v. United States*, 152 U. S. 211.

<sup>3</sup> *Poppe v. Athearn*, 42 Cal. 607; *Rose v. Nevada & G. V. Wood & Lumber Co.*, 73 Cal. 385; *Chapman v. Quinn*, 56 Cal. 266.

By these rules<sup>1</sup> the tunnel locator is required, as soon as his projected tunnel enters cover, to give notice by erecting a substantial board or monument at the "face" or point of commencement thereof, upon which must be posted a good and sufficient notice, containing:—

- (1) The names of the parties claiming the tunnel right;
- (2) The actual or proposed course or direction of the tunnel;
- (3) The height and width thereof;
- (4) The course and distance from such face or point of commencement to some permanent well-known objects in the vicinity, by which to fix and determine the *locus*, as in case of lode claims.

The "boundary *lines*" thereof are to be established by stakes and monuments along such lines, at proper intervals, to the terminus of the three thousand feet from the "face" or point of commencement.

At the time of posting the notice and marking out the lines, a full and correct copy of such notice, defining the tunnel claim, must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case, stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon, the extent of work performed, and that it is their *bona fide* intention to prosecute work on the tunnel so located and described, with reasonable diligence. As to what *lines* are to be marked, we shall consider in a subsequent section.

§ 473. "Line" of tunnel defined.—The supreme court of Colorado has held, that the *line* of the tunnel mentioned in the act designates a width marked by the exterior lines or sides of the tunnel.<sup>2</sup> This view is accepted by the

<sup>1</sup> See, Circ. Instructions, Dec. 10, 1891, pars. 20–26. See appendix.

<sup>2</sup> Corning Tunnel v. Pell, 4 Colo. 507, 511.

supreme court of Montana,<sup>1</sup> and is in harmony with the rulings of the land department.<sup>2</sup> The circuit court of appeals for the eighth circuit, in the case of *Enterprise M. Co. v. Rico-Aspen Cons. M. Co.*,<sup>3</sup> undoubtedly coincides with this definition, as will be observed from the language of its decision taken in connection with the plat referred to and the plat accompanying the decision of Judge Hallett.<sup>4</sup> A like interpretation by the supreme court of Idaho is necessarily inferred from a reading of the opinion of that court in *Back v. Sierra Nevada Cons. M. Co.*<sup>5</sup>

We are entitled to assume, that there is no doubt as to what is meant by the "line of such tunnel"—that it is the width marked by the exterior sides of the tunnel throughout the length of three thousand feet in the direction claimed. This definition is an important factor in construing the other provisions of the act, and enables us to reach a plausible conclusion as to the extent of the privileges conferred upon the tunnel locator.

§ 474. "Face" of tunnel defined.—The land department construes the term "face of such tunnel" as used in the Revised Statutes to mean, the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be measured. There is no room for dispute as to this. While, in speaking of the face of a drift or tunnel in the conduct of active mining operations, as work advances the face recedes farther into the hill, and its *locus* is constantly changed, the word as used in the tunnel law can mean but the one thing, and that is, the first full exposure of height and width after entering

<sup>1</sup> *Hope M. Co. v. Brown*, 7 Mont. 550, 557; *Id.*, 11 Mont. 370, 379.

<sup>2</sup> *In re David Hunter*, 5 Copp's L. O. 130; Copp's U. S. Min. Lands 231; Commissioner Drummond, Copp's U. S. Min. Dec. 144; Commissioner Williamson, Copp's Min. Lands, 222; *Corning Tunnel M. & R. Co. v. Pell*, 3 Copp's L. O. 130, 131.

<sup>3</sup> 66 Fed. 200.

<sup>4</sup> 53 Fed. 321. See, *post*, § 487, fig. 23.

<sup>5</sup> 2 Idaho, 396.

under cover. It was manifestly intended that the length of the open surface approach to where the tunnel enters cover was not to be considered in estimating the three thousand feet, and for that reason the term "face" was used.

§ 475. **The marking of the tunnel location on the ground.**—We have already noted the regulation of the land department requiring the locator of a tunnel to mark the boundary *lines* thereof. We have italicized the word *lines*, inviting attention to the fact that the statute refers only to a single *line*. Assuming that the regulation is authorized by the law, what is meant by the *lines* of the tunnel? The only answer to this question which is consistent with the construction of the act followed by the land department, as well as the courts,<sup>1</sup> is, that the *lines* are those drawn parallel to the course of the tunnel, at a distance from each other equal to the width of the tunnel, so that vertical planes drawn through them will, upon reaching the proper depth, be coincident with the sides of the tunnel. As marked upon the surface they would represent a parallelogram three thousand feet long, with a width equal to the width of the tunnel bore, which is usually six or eight feet. No sanction is found for marking any other lines. The department has held, that while the tunnel proprietor may, upon discovery in the tunnel, make a location upon the surface on either side of the tunnel line to the extent of fifteen hundred feet in length by the width allowed by law, there is no authority for staking out a superficies fifteen hundred feet, or three thousand feet wide by three thousand feet long.<sup>2</sup>

This view finds support in the decision of the supreme court of Colorado, in the case of Corning Tunnel Co. v. Pell.<sup>3</sup> The marking herein indicated is all that the law or regulations require.

<sup>1</sup> See, *ante*, § 473.

<sup>2</sup> Corning Tunnel M. & R. Co. v. Pell, 3 Copp's L. O. 130.

<sup>3</sup> 4 Colo. 507, 510.

**ARTICLE III. RIGHTS ACCRUING TO THE TUNNEL PROPRIETOR BY VIRTUE OF HIS TUNNEL LOCATION.**

§ 479. Important questions suggested by the tunnel law.	face from exploration by others?
§ 480. Rule of interpretation applied.	§ 484. The Colorado rule.
§ 481. Length upon the discovered lode awarded to the tunnel discoverer.	§ 485. The Montana rule.
§ 482. Necessity for appropriation of discovered lode by surface location.	§ 486. The Idaho rule.
§ 483. To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the sur-	§ 487. Judge Hallett's views.
	§ 488. The doctrine announced by the circuit court of appeals, eighth circuit.
	§ 489. Tunnel locations before the supreme court of the United States.
	§ 490. Opinions of the land department.
	§ 491. Conclusions.

**§ 479. Important questions suggested by the tunnel law.**—The provisions of the law upon the subject of tunnel locations present for consideration several important questions, the solution of which has engaged the attention of the courts, both state and federal. The results reached are by no means harmonious. The inquiries suggested may be thus formulated:—

(1) What are the rights accruing to the tunnel proprietor by virtue of a discovery made in the tunnel, in the absence of conflicting rights acquired by surface discovery?

(2) To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with diligence operate as a withdrawal of the surface from exploration by others?

Some incidental questions necessarily arise, the correct solution of which depends upon reaching a satisfactory conclusion, by way of answers to one or the other of the foregoing inquiries.

§ 480. **Rule of interpretation applied.**—Section twenty-three hundred and twenty-three of the Revised Statutes provides, that the tunnel discoverer shall have the right of possession of all veins not previously known to exist, to the same extent as if discovered from the surface.

This is to be construed in connection with the entire body of the mining law, and not as if it stood as an isolated piece of legislation. It must be harmonized, if possible, with all existing legislation which is essentially *in pari materia*. The intention of the law-maker is to be deduced from the whole statute and every material part of the same.<sup>1</sup> To determine the extent of rights conferred by discovery from the surface, we must resort to other sections of the law.

§ 481. **Length upon the discovered lode awarded to the tunnel discoverer.**—Section twenty-three hundred and twenty of the Revised Statutes provides, that a mining location based upon a surface discovery may equal, but shall not exceed, fifteen hundred feet in length.

As to the length on the discovered lode to which the tunnel discoverer is entitled, Judge Hallett was of the opinion, that it was not fixed by the act of congress, but was left to local regulation, and that, in the absence of such regulation, nothing would pass but the line of the tunnel.<sup>2</sup>

Prior to the passage of the congressional law, a state statute was in existence in Colorado, fixing the length at two hundred and fifty feet each way from the tunnel, and Judge Hallett held this statute to be controlling after the enactment of the federal law. The supreme court of the United States has incidentally stated that such was the rule, but the case then under consideration arose out of a

<sup>1</sup> Pennington v. Coxe, 2 Cranch, 33; Washington Market Co. v. Hoffman, 101 U. S. 112; Platt v. Union Pac. R. R., 99 U. S. 48; Kohlsaat v. Murphy, 96 U. S. 153; Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634; Neal v. Clark, 95 U. S. 704.

<sup>2</sup> Rico-Aspen Cons. M. Co. v. Enterprise M. Co., 53 Fed. 321.



location made in 1865, at a time when the statute was undoubtedly controlling.<sup>1</sup>

The supreme court of Colorado has determined that this state law was not in force after the passage of the congressional law, and that a discovery in the tunnel entitled the discoverer to fifteen hundred feet in length on the lode, under the provisions of section twenty-three hundred and twenty of the Revised Statutes,<sup>2</sup> which ruling was followed by the circuit court of appeals for the eighth circuit, overruling the decision of Judge Hallett above referred to.<sup>3</sup>

The supreme court of Montana has stated, that when veins, or lodes, are discovered in the tunnel, the claimant will be entitled, as a matter of right, to the vein, or lode, for fifteen hundred feet in length,<sup>4</sup> and this is the understanding of the law expressed by the commissioner of the general land office.<sup>5</sup>

We may therefore safely conclude, that the discoverer of a lode encountered in driving a tunnel is, in the absence of any conflicting claims, entitled to fifteen hundred feet in length on the discovered vein, and that this right is referable to section twenty-three hundred and twenty of the Revised Statutes.

How is this fifteen hundred feet to be measured? A proper answer to this question involves the correct determination of two others:—

(1) After discovery in a tunnel, is it necessary to mark the location of the discovered lode on the surface?

(2) If it is necessary to so mark the location, must the boundaries include the apex?

<sup>1</sup> Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471, 481.

<sup>2</sup> Elliot v. Campbell, 18 Colo. 510.

<sup>3</sup> Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. 200.

<sup>4</sup> Hope M. Co. v. Brown, 7 Mont. 500, 550.

At one time a state law existed in Montana, limiting the extent to three hundred feet on each side of the discovery, but this has since been repealed by implication. Civil Code 1895, § 4672; Pol. Code 1895, § 5186.

<sup>5</sup> Commissioner Drummond, Copp's Min. Dec. 144.

§ 482. **Necessity for appropriation of discovered lode by surface location.**—It being well established that the tunnel discoverer is entitled to fifteen hundred feet in length on his discovered lode, the inquiry naturally suggests itself: How is he to disclose his intention as to the extent and direction in which he shall take it, so as to inform others where his rights end and theirs may begin? How are other prospectors to find out where to search for or locate lodes, with due regard to the rights of the tunnel discoverer?

Judge Hallett, in the case of Rico-Aspen Cons. M. Co. v. Enterprise M. Co.,<sup>1</sup> ruled, that in case of a location based upon discovery made in a tunnel, it is as necessary to mark the boundaries on the surface and file a certificate for record, as in any other case. This is in accord with the views of Commissioner Williamson, who instructed the surveyor-general of Colorado, that "no patent can issue for a vein, "or lode, without surface ground, and as the surface which "overlies the apex of a vein, or lode, discovered in a tunnel can only be ascertained by sinking a shaft, or by "following a lode up on its dip from the point of discovery, no survey of such lode will be made until the exact "surface ground is first ascertained;"<sup>2</sup> and this ruling has been uniformly adhered to by the land department.

The supreme court of Colorado, however, has taken a different view. It announces the rule that location on the surface by defining surface boundaries is not necessary.

Its argument is based upon the following reasoning:—

"Section twenty-three hundred and twenty-three was "obviously designed to encourage the running of tunnels "for the discovery and development of veins, or lodes, of "the precious metals not appearing upon the surface and "not previously known to exist. Little encouragement "would the act give if the discoverer of a lode in a tunnel "were bound also to find the apex and course of such vein, "uncover the same from the surface, sink his location shaft

<sup>1</sup> 53 Fed. 321.

<sup>2</sup> 4 Copp's L. O. 102. See, also, *In re David Hunter*, Copp's Min. Lands, 231.

"thereon, mark the boundaries thereof, and record his certificate of such surface location, the same as if he had made the original discovery from the surface.

"The location of a lode from the surface is always attended with more or less difficulty and uncertainty. Mistakes occur in the location of boundary lines, even where the apex and course of the vein lie comparatively near the surface. These difficulties and uncertainties are liable to be greatly increased where a lode is discovered by means of a tunnel driven hundreds and thousands of feet into the heart of the great mountain. To require the discoverer of a lode in a tunnel to prospect for the vein upon the surface, and uncover and mark its boundaries so as to include the apex and course within the lines of the surface location, would be to require a work of supererogation, for no surface location is necessary for the convenient working of the lode discovered in a tunnel location already made. Such requirement would unnecessarily burden the tunnel locator and discoverer; to the great labor and expense of tunneling as a means of a location and discovery, it would add the labor and expense devolving upon the ordinary surface discoverer and locator. Besides, such a requirement would subject the discoverer of a lode in a tunnel to the hazard of a race for its surface location; and thus the discoverer might have the fruits of his labor wrested from him by a surface locator who had done nothing and expended nothing in the original discovery."<sup>1</sup>

The location of the lode discovered in the tunnel in this case was by posting a notice at the mouth of the tunnel, claiming seven hundred and fifty feet on each side of the discovery point in the tunnel, five hundred and ninety-four feet from its face. A notice was also recorded in the county recorder's office, corresponding with the posted notice.

It is a grave undertaking for an author to attack a decision of a court as pre-eminent in the mining world as the supreme court of Colorado. But whichever way we turn in construing this law we are met with like embarrassments. No solution can possibly be reached which will harmonize with all of the decisions of all the courts.

<sup>1</sup> *Ellet v. Campbell*, 18 Colo. 510, 519, 520.

Under the circumstances, we think we are justified in analyzing all of the decisions and deducing our conclusions. Unless such conclusions are based upon logic and reason, they will not be of any controlling force.

First addressing ourselves to the manner in which the lode discovered in the tunnel was located, *i. e.* by posting a notice at the mouth of the tunnel and recording a similar notice, we fail to find any sanction for such a proceeding. Neither posting nor recording are enjoined by the federal law. In the absence of state law or regulation none is necessary.<sup>1</sup>

Wherever in any state legislation a notice is required to be posted, it must be placed either upon the lode or in reasonable proximity to it.<sup>2</sup> In Colorado, it is to be posted at the point of discovery.<sup>3</sup> It performs a mere temporary function, protecting the discoverer in his possession during the time allowed for the completion of his location. It is succeeded by a certificate of location, which is the basis of the record. This certificate is required by law of Congress to contain such a description of the claim by reference to some natural object or permanent monument as will identify the *claim*, so as to permit others to determine its *locus on the surface*. Unless the recorded certificate considered by the supreme court of Colorado falls within the sanction of the state law, it is worthless. It would be irrelevant and inadmissible as evidence, and no constructive notice is imparted thereby.<sup>4</sup>

The federal laws do not provide for any method of appropriation of lodes, except by locating a surface inclosing them, and this requires the marking of the location on the ground so that the boundaries may be readily traced.<sup>5</sup>

How are the end lines of a lode claimed by discovery in a tunnel to be marked, so that the extralateral rights of others on another portion of the same vein located from

<sup>1</sup> See, *ante*, §§ 350, 389.

<sup>2</sup> See, *ante*, § 356.

<sup>3</sup> See, *ante*, § 352.

<sup>4</sup> See, *ante*, § 392.

<sup>5</sup> See, *ante*, § 371.

the surface, outside of any possible surface conflict with a tunnel claimant, may be defined?

If it should be answered that such end lines must be drawn parallel to the line of the tunnel, or at right angles to the general course of the discovered lode, we say that there is no warrant in the law for such methods. It would be judicial legislation for courts to so assert.

It seems to us, that in construing the entire body of the mining law there is but one logical conclusion to be reached, and that is, that the tunnel location is a means of discovery; that when discovery is made, the surface location must follow within a reasonable time, or within the period fixed by the state laws; that this location must cover the apex; and as to this, the tunnel and surface discoverer are placed in the same category—they both locate at their peril.<sup>1</sup>

But it will be urged, that the discovery being on the dip of the vein, as a rule it will be impossible to make the location upon the surface so as to include both the apex and place of discovery. In other words, the discovery will not be within the limits of the claim as required by section twenty-three hundred and twenty.

Our answer is, that the right granted by section twenty-three hundred and twenty-three to acquire the veins by tunnel discovery *to the same extent as if discovered from the surface*, necessarily implies an exception to the rule, that the discovery must be within the surface boundaries. Some legislation of this character was necessary to give any effect to a tunnel discovery.

When the apex is covered by the surface location, with proper direction given to the end lines, the place of discovery will be within the limits of, and covered by, the grant, *i. e.* the ownership of the vein in its entire depth, acquired by the surface location, and in contemplation of law it is a *part of the claim*.

In response to the suggestion that little encouragement

<sup>1</sup> See, *ante*, §§ 364-365.

would be given to exploitation by tunnel if the tunnel claimant were put to the inconvenience of locating the apex, we suggest, that the surface locator is put to this inconvenience, and his hardships are greater than a tunnel discoverer's. With a vein cut in a tunnel, it is far easier to trace its course by drifting, and its angle of declination by upraising, than it is to establish it from the surface, unless the outcrop is pronounced and well defined.

Be that as it may, individual hardships invariably flow from the application of many general laws, and this affords no substantial reason for ignoring them.

If the courts are compelled, as they concede that they are,<sup>1</sup> to resort to section twenty-three hundred and twenty of the Revised Statutes to determine the rights of a tunnel discoverer as to length along the discovered lode, why should they reject all the remaining elements contained in that section, which are the attributes of the location by which the right to a discovered lode to the length stated is established and perfected? It seems to us that the rule announced by the supreme court of Colorado violates the cardinal rule of construction announced in a previous section,<sup>2</sup> and that in reaching its conclusion, it fails to consider the entire body of the mining law.

As to the suggestion of that court that no surface is required for the convenient working of a lode discovered in a tunnel, the court overlooks two essential elements. In the first place, the theory which was prevalent prior to the passage of the act of May 10, 1872, that surface was to be granted in connection with the lode simply for convenient working purposes, finds no place in the act which contains the tunnel provisions. The act which permitted a patent in the form of the Idaho mine, shown in figure 1, page 67, gave place to a law framed on altogether different theories.<sup>3</sup>

The requirement as to surface delineation of a location under the later law, by marking the location on the ground so that its boundaries could be readily traced, was not for

<sup>1</sup> See, *ante*, § 481.

<sup>2</sup> See, *ante*, §§ 68, 71.

<sup>3</sup> See, *ante*, § 480.



the peculiar benefit of the discoverer and locator, but that others seeking in good faith to discover and locate unappropriated lodes might be able to ascertain exactly what had been theretofore appropriated.<sup>1</sup> If a tunnel locator is permitted to attach his permanent rights on a discovered lode to a point in the bowels of the earth absolutely inaccessible to any one else, without his voluntary consent, how can the *situs* of his discovered lode be fixed, so as to warn the subsequent prospector of the tunnel proprietor's rights?

The tunnel discoverer has the exclusive knowledge of the position of the vein in the earth. He alone has the facilities for determining the angle of declination, the course of the vein, and approximately, at least, the position and direction of the apex upon or near the surface. To say, that after a discovery in the tunnel, if the tunnel proprietor is compelled to mark his location upon the surface, he is subject to the hazard of a race of diligence against one who might stake out his boundaries on the surface, implies one of two legal absurdities: Either that a person in hostility to the tunnel discoverer may base a location without any discovery, or that he may make a location founded upon the discovery by another, which is only permitted in cases of abandonment by the discoverer.<sup>2</sup> A complete answer to this objection is found in the fact, that after discovery in a tunnel the discoverer would be protected for at least a reasonable time in which to mark his boundaries.<sup>3</sup>

We can conceive of no legal hardship flowing from the necessity for compliance with the requirements as to surface marking. A tunnel locator projects his tunnel with a full knowledge of the law. He starts with his eyes open as to its defects and ambiguities. He is charged with the knowledge of the regulations and rulings of the land department, which, from the beginning, have insisted upon a surface marking. If he projects his tunnel with this knowledge, we do not see what equities arise from expenditures made in prosecuting his work which may legally

<sup>1</sup> See, *ante*, § 371.

<sup>2</sup> See, *ante*, §§ 339, 372.

<sup>3</sup> See, *ante*, § 403.



address themselves to the "conscience of the chancellor." To uphold the views announced by the supreme court of Colorado requires us also to ignore an element of interpretation frequently announced and upheld by the supreme court of the United States.

The contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts.<sup>1</sup>

The fact that this construction by the land department originated in a letter, written perhaps informally, or in answer to an official inquiry, is not at all material if it is shown that the views therein expressed have uniformly been recognized by the land department, and that such is the fact in this instance it cannot be successfully denied.

We think we are justified in the conclusion, that a lode discovered in a tunnel must be located from the surface, the boundaries must be marked, and all other requirements pertaining to lode locations generally must be fulfilled. The rights upon such discovered lode will thereafter be defined by the surface boundaries and their relationship to the located lode. This rule permits some force to be given to all the provisions of the Revised Statutes. Any other interpretation violates many of them.

**§ 483. To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others?**—It seems to have been assumed by many, if not all, of the courts, that a tunnel location once perfected in accordance with the departmental regulations has the effect of withdrawing from the body of the public domain a certain superficial area, within

<sup>1</sup> *Pennoyer v. McConnaughy*, 140 U. S. 1; *United States v. Hill*, 120 U. S. 169; *United States v. Philbrick*, *Id.* 52; *Hahn v. United States*, 107 U. S. 402; *United States v. Moore*, 95 U. S. 760; *Brown v. United States*, 113 U. S. 568; *Barden v. N. P. R. R.*, 154 U. S. 288; *Montana Co., Limited, v. Clark*, 42 Fed. 629.

which, so long as work in the tunnel is prosecuted with reasonable diligence, surface exploration is prohibited. Before seeking for the justification of this assumption in the terms of the mining statutes, it is advisable to examine the adjudicated law upon the subject and determine, if possible, to what extent, if any, the various tribunals agree in their conclusions.

We find that this question, with others incidentally involved, has been before the courts of Colorado, Montana, and Idaho, and the federal courts in the eighth circuit.

§ 484. **The Colorado rule.**—The case of *Corning Tunnel Co. v. Pell*<sup>1</sup> involved a controversy between the tunnel company locating a tunnel in September, 1872, and the locators of the Slide lode, located August 17, 1875.

The Slide lode was fifteen hundred feet in length, and crossed the center line of the tunnel site nearly at right angles. The discovery shaft was near, but not on, the center line, being about fifty-five feet therefrom. The lode had not been reached or cut by the tunnel.

The tunnel site as claimed described a parallelogram, three thousand by fifteen hundred feet. The tunnel had been worked with reasonable diligence, and had not been abandoned. The owners of the Slide lode applied for a patent, and the tunnel company adversed. The action was in support of the adverse claim and to try the title to the Slide lode.

It was contended by the tunnel claimant, that the "line of the tunnel" meant the entire width and length of the surveyed tunnel site, that is, fifteen hundred by three thousand feet; that within these limits, after the commencement of the tunnel and while it is prosecuted with diligence, no valid location could be made of a vein, or lode, not appearing upon the surface.

The supreme court of Colorado held:—

(1) That there was no law authorizing a tunnel location

<sup>1</sup> 4 Colo. 507.

of any such dimensions; that the line of tunnel was the width marked by the exterior lines or sides of the tunnel;<sup>1</sup>

(2) That the result contended for by the tunnel claimant forbids its adoption, unless the language clearly indicates such to have been the legislative intent. In this case, the tunnel-site location would withdraw from the exploration of prospectors over one hundred acres of mineral lands. A very limited number of tunnel locations would cover and monopolize, in most cases, an entire mining district, giving to a few tunnel owners all its mines, not upon the condition of discovery and development, but upon the easy condition of a *commencement* of work on the tunnel, and its prosecution with reasonable diligence. The policy of the general government has been to prevent monopoly of its mineral lands, or its ownership in large tracts. But for the existence of this policy, there was but little or no reason for an abandonment of its system of surveys and pre-emptions applicable to agricultural lands, and the adoption as to its mineral lands of a system that, as to surface claims at least, limits mining locations to an inconsiderable acreage, appendant to a discovered lode. The construction claimed is in contravention of this policy; nor can it be justified by the language of the section;

(3) No right of possession of a lode inures to the tunnel claimant until it is *discovered* in the tunnel;

(4) The Slide lode, not having been discovered in the tunnel by the tunnel proprietor, and the "location," *i. e.* *discovery*, not being on the line thereof, the tunnel proprietor had no right to the lode.

This is a clear enunciation of the rule, that the mere location of the tunnel site does not withdraw the surface adjacent to the tunnel *line* from exploration and location; that the tunnel is only a means of discovery, and that priority of discovery establishes a priority of right.

Fifteen years later the same tunnel site was again brought

<sup>1</sup> See, *ante*, § 473.

to the attention of the same court, in the case of *Ellet v. Campbell*<sup>1</sup> upon the following state of facts:—

The tunnel claimant, on February 3, 1875, discovered in the tunnel, on the line thereof, five hundred and ninety-four feet from the face, the Bonanza lode, and located it by posting a notice at the mouth of the tunnel and recording a similar notice as described in a preceding section.<sup>2</sup>

The Bonanza lode did not appear upon the surface of the ground, and was not known to exist prior to discovery in the tunnel. It was not staked on the surface. No discovery shaft was sunk, or work done upon the surface. The annual work on the lode was regularly performed. On July 10, 1886, Campbell, the defendant, and another made a location of the J. L. Sanderson lode, which was identical with the Bonanza lode. Their location was based upon a discovery made in a "cut," two hundred feet to the east of the east line of the bore of the tunnel. At the time of marking the Sanderson location, the locators knew of the discovery theretofore made in the tunnel. The locators of the Sanderson lode applied for a patent, the tunnel claimant adversed, and hence the suit.

Upon this state of facts, the supreme court of Colorado held, that having made a discovery in the tunnel, the discoverer is not bound to make another discovery and location of the lode from the surface, in order to be protected against a subsequent surface locator of the same lode.

Having determined that it was not necessary to mark the location on the surface, and that the manner of location heretofore described was sufficient, the appropriation of the lode having been perpetuated by continued performance of the annual work, no other conclusion could possibly have been reached by the court than the one announced. Our criticism of the decision in a previous section is based upon that part of the ruling which denies the necessity for a location upon the surface.

We do not see in what manner the doctrine announced

<sup>1</sup> 18 Colo. 510.

<sup>2</sup> See, *ante*, § 482.

of any such dimensions; that the line of tunnel was the width marked by the exterior lines or sides of the tunnel;<sup>1</sup>

(2) That the result contended for by the tunnel claimant forbids its adoption, unless the language clearly indicates such to have been the legislative intent. In this case, the tunnel-site location would withdraw from the exploration of prospectors over one hundred acres of mineral lands. A very limited number of tunnel locations would cover and monopolize, in most cases, an entire mining district, giving to a few tunnel owners all its mines, not upon the condition of discovery and development, but upon the easy condition of a *commencement* of work on the tunnel, and its prosecution with reasonable diligence. The policy of the general government has been to prevent monopoly of its mineral lands, or its ownership in large tracts. But for the existence of this policy, there was but little or no reason for an abandonment of its system of surveys and pre-emptions applicable to agricultural lands, and the adoption as to its mineral lands of a system that, as to surface claims at least, limits mining locations to an inconsiderable acreage, appendant to a discovered lode. The construction claimed is in contravention of this policy; nor can it be justified by the language of the section;

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This is a clear enunciation of the rule, that the mere location of the tunnel site does not withdraw the surface adjacent to the tunnel *line* from exploration and location; that the tunnel is only a means of discovery, and that priority of discovery establishes a priority of right.

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The Bonanza lode did not appear upon the surface of the ground, and was not known to exist prior to discovery in the tunnel. It was not staked on the surface. No discovery shaft was sunk, or work done upon the surface. The annual work on the lode was regularly performed. On July 10, 1886, Campbell, the defendant, and another made a location of the J. L. Sanderson lode, which was identical with the Bonanza lode. Their location was based upon a discovery made in a "cut," two hundred feet to the east of the east line of the bore ~~of~~ the tunnel. At the time of marking the Sanderson location, the locators knew of the discovery theretofore made in the tunnel. The locators of the Sanderson lode applied for a patent, the tunnel claimant adversed, and hence the suit.

Upon this state of facts, the supreme court of Colorado held, that having made a discovery in the tunnel, the discoverer is not bound to make another discovery and location of the lode from the surface, in order to be protected against a subsequent surface locator of the same lode.

Having determined that it was not necessary to mark the location on the surface, and that the manner of location heretofore described was sufficient, the appropriation of the lode having been perpetuated by continued performance of the annual work, no other conclusion could possibly have been reached by the court than the one announced. Our criticism of the decision in a previous section is based upon that part of the ruling which denies the necessity for a location upon the surface.

We do not see in what manner the doctrine announced

<sup>1</sup> 18 Colo. 510.

<sup>2</sup> See, *ante*, § 482.



in *Corning Tunnel Co. v. Pell* is affected by the decision in *Ellet v. Campbell*. Both cases sustain the claims of prior discoverers. In fact, priority of discovery is the foundation of both decisions. So far as the state courts of Colorado have thus far expressed themselves, the rule in *Corning Tunnel Co. v. Pell*, that the location of a tunnel does not operate as a withdrawal of the surface adjacent to the line of the tunnel from exploration, and that priority of discovery establishes priority of right, remains unchallenged.

§ 485. **The Montana rule.**—At the time the cases considered by the supreme court of Montana arose, there was a state statute, which had been enacted in 1872, and which contained among others the following provisions:—

“Any person or persons pre-empting any tunnel have the right to locate the same on any and all lodes that he or they may discover in three hundred feet on each side of the line of the tunnel, on any and all lodes that may be discovered in the course of said tunnel.”

In June, 1887, the Hope Mining Company located the Jubilee tunnel in Deer Lodge county, Montana. In the following December, Brown located a quartz claim within three hundred feet of the line of the tunnel. In the location upon a *discovery in a tunnel*, and Wartz claim within extracting ore therefrom when the Hope Mining Company sought an injunction preventing further mining operations by the quartz claimant. The ledge in controversy had been discovered in the Jubilee tunnel, although the company's claim alleged that it appeared to cross it.

The supreme court of Montana held:—

(1) That a tunnel claimant upon discovering a vein, or lode, in his tunnel will be entitled as a matter of right to the vein, or lode, for fifteen hundred feet in length along its course, and to the extent of three hundred feet on each side thereof from the middle of the vein;

(2) Brown's location is valid, though liable to be divested by the subsequent discovery of the same vein in



the Hope tunnel, if such location is found to be within three hundred feet from the middle of, and fifteen hundred feet from the point of, the tunnel discovery, measured along the vein. That third parties have the right to locate any veins within three hundred feet of the line of the tunnel, which is held to be the width of the sides of the tunnel, but such locations so made are at the risk of the locators, for upon the discovery of the vein, or lode, in the tunnel all locations made subsequent to the commencement of the tunnel become invalid if they are within the distances above specified.

The court also adds the following: -

"As a matter of course, veins, or lodes, *discovered from the surface*, or previously known to exist, are not affected "by the right of the tunnel claimant, *which we may here remark to be most ample and sweeping.*"

The injunction was denied.<sup>1</sup>

It is extremely difficult to ascertain precisely what the court meant by the language used in the quoted paragraph. If a discovery from the surface made prior to discovery in the tunnel, but after the perfection of the tunnel location, would take precedence over the subsequent tunnel discovery, it is difficult to understand the closing remark, that the tunnel proprietor's rights are most ample and sweeping.

Another case between the same parties, involving the same relative rights, came before the same court a few years later, wherein it appeared that Brown had applied for a patent for his location made as indicated in the previous case. The tunnel company adversed, and the action was to determine the adverse claim.

The court held, upon the showing made, that the applicant for patent ought to be restrained from prosecuting his proceedings while the tunnel proprietor is prosecuting his tunnel as required by law, and until it is demonstrated that such vein, or lode, will not be discovered in the

<sup>1</sup> Hope M. Co. v. Brown, 7 Mont. 550.

tunnel, or until such tunnel rights are abandoned by failure to prosecute the tunnel as provided by law.<sup>1</sup>

It must be conceded that the views of the supreme court of Montana tend to support the doctrine, that a perfected tunnel site practically withdraws the surface to the extent of fifteen hundred feet on each side of the line of the tunnel, and that the withdrawal remains in force until it is either demonstrated that a given lode will not be cut in the tunnel or the tunnel site is abandoned.

§ 486. **The Idaho rule.**—In the case of *Back v. Sierra Nevada Cons. M. Co.*<sup>2</sup> the following state of facts appeared:—

The complaint alleged in substance that Back owned the Pilgrim tunnel, located April 5, 1886. On April 6, 1886, defendants grantors entered *upon the line* of the tunnel at a point where post number nine on said line was planted. They had full knowledge of the existence of the post and the location of the tunnel. They commenced to prospect for minerals, and at a depth of twelve feet discovered a ledge.

This ledge was blind, and would be intersected by the tunnel continued on the location line thereof. Defendants grantors located and recorded a mining claim called the Sierra Nevada, and afterwards made application for patent. Back filed an adverse claim, and the suit was brought to determine the rights of the parties. A demurrer to the complaint was sustained. Judgment passed for defendants on failure to answer. The appeal was prosecuted from the judgment.

It was held by the supreme court of Idaho, reversing the judgment:—

(1) That a tunnel location is a “mining claim,” and may protect its rights by adversing application for patent to ledges asserted to have been located on the line of said tunnel subsequent to the tunnel location;

(2) It is evident that, in enacting section twenty-three

<sup>1</sup> *Hope M. Co. v. Brown*, 11 Mont. 370.

<sup>2</sup> 2 Idaho, 386.

hundred and twenty-three of the Revised Statutes, congress intended to withdraw from exploration for lodes not appearing upon the surface so much of the public domain as lay upon the *line* of the tunnel;

(3) The tunnel claimant has a right to the possession, for prospecting purposes, of the area in dispute, and to show that the respondent's location was upon the line of his tunnel.

No attempt is made to define what is meant by the *line* of the tunnel.

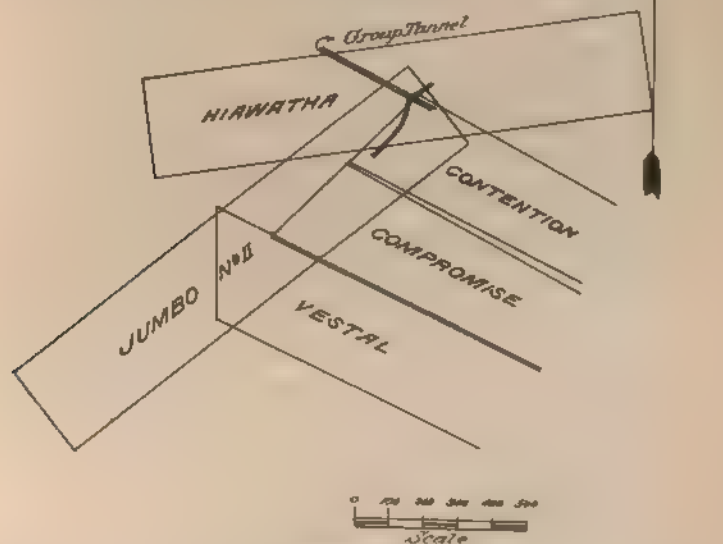


FIGURE 23.

§ 487. **Judge Hallett's views.**—The tunnel law came before Judge Hallett in the case of Rico-Aspen Cons. M. Co. v. Enterprise M. Co.<sup>1</sup> His decision is accompanied with a diagram, which we herewith reproduce (figure 23).

The facts were substantially as follows:—

The Rico-Aspen Company asserted title to three mining claims the Vestal, located in 1879; Contention, January

<sup>1</sup> 53 Fed. 321.

1, 1888, and Compromise, November 18, 1889. The Hiawatha was not necessarily involved in the litigation, although it may be noted that its location was junior in point of time to the inception of the tunnel right.

The Enterprise Mining Company perfected its location of the Group tunnel in July, 1887; and in June, 1892, discovered and located the Jumbo II. claim, delineating it upon the surface as indicated on the diagram.

Said Judge Hallett, after quoting the language of section twenty-three hundred and twenty-three of the Revised Statutes:—

“Clearly enough, this is a grant of lodes and veins on  
 “the line of the tunnel, and the only difficulty is in ascer-  
 “taining the extent of the grant. The supreme court of  
 “this state (referring to *Corning Tunnel Co. v. Pell*) inter-  
 “prets the act as giving only so much of such veins and  
 “lodes as may be in the tunnel itself. But this seems to  
 “reduce the grant to a point of insignificance which de-  
 “prives the act of all force and meaning. Certainly, no  
 “one would be at the trouble and expense of driving a  
 “tunnel through a mountain for such small segments of  
 “lodes, or veins, as may be in the bore of the tunnel. On  
 “the other hand, respondents contend that the grant is  
 “of the length of a surface location in any direction from  
 “the line of the tunnel, and as stated, almost the entire  
 “length of the Jumbo II. is in a southwesterly direction  
 “from that line. Under this construction, the location of  
 “a tunnel, followed by some lazy perfunctory work twice  
 “in the year, will have the effect to withdraw from the  
 “public domain a tract three thousand feet square, or  
 “something more than a half section of land; and this  
 “in the face of the earlier declaration of the statute,  
 “that ‘no location of a mining claim shall be made until  
 “‘the discovery of the vein, or lode, within the limits  
 “‘of the claim located.’ This view is so far inconsis-  
 “ent with the general policy of the law which forbids  
 “the granting of large areas of valuable mineral lands  
 “to one person or company, that it seems impossible to  
 “accept it.”

The conclusions reached by Judge Hallett may be thus summed up:—

(1) The length of a location made upon a lode discovered in a tunnel is not fixed by the act of congress, but is left to local regulations;

(2) Without local regulation as to length of a claim founded on a discovery in a tunnel, nothing would pass but the line of the tunnel itself;

(3) The Colorado statute of 1861<sup>1</sup> is in force in Colorado, and secures to the tunnel locator two hundred and fifty feet each way from the tunnel, on all lodes discovered within the tunnel. As to the two hundred and fifty feet, the tunnel proprietor becomes the owner of the ledge, its location dating back to the inception of the tunnel right;

(4) As to the Vestal, owing to the priority of its location, decree passed for complainant. As to the Compromise and Contention, their location should, to the extent sanctioned by the state law, yield to the rights of the Jumbo II., which related back to the inception of the tunnel right.

§ 488. **The doctrine announced by the circuit court of appeals, eighth circuit.**—An appeal was taken from Judge Hallett's decree in the Rico-Aspen-Enterprise case, and the appellate court declined to adopt his views.<sup>2</sup> When the case was before Judge Hallett, the facts as they are recited in the opinion fixed 1879 as the date of the Vestal location, prior in point of time to the location of the Group tunnel. For this reason it received but little attention, the reasoning of the judge being particularly addressed to the Contention and Compromise, which were junior in point of time to the tunnel location, although senior with reference to the tunnel discovery.

The case as presented to the appellate court seems to be somewhat different, the controversy apparently centering within the conflict area between the Vestal and Jumbo II., and the record seems to give to the former a date of

<sup>1</sup> Mills' Annot. Stats., § 3141.

<sup>2</sup> Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. 201.

location, *junior*, in point of time, to the inception of the tunnel right.

The principles involved, however, are, of course, the same.

The questions involved are presented by the appellate court in the following form:—

(1) Are the owners of a valid tunnel mining claim under section twenty-three hundred and twenty-three of the Revised Statutes, who have discovered a blind vein in their tunnel and have duly located and claimed it, entitled, as against the owners of a lode mining claim located from the surface after the location of the tunnel site, but before the discovery of the vein in the tunnel, to the possession of the vein, or lode, thus discovered, when such vein was not known to exist prior to the location of the tunnel, but was first discovered in another lode mining claim before its discovery in the tunnel?

(2) If the owners of a tunnel mining claim are entitled to the possession of any portion of such a vein, to what extent are they entitled to it?

Another question was also presented and decided, which refers to the effect of a patent issued upon the junior surface location where the tunnel claimant failed to adverse. The discussion of this branch of the case will be deferred until we reach, in another portion of the work, the subject of patent proceedings and the legal effect of a patent when issued.

As preliminary to a discussion of the principles involved, the court announced as follows:—

“There is no tenable middle ground under this section  
 “between a holding that the diligent owner of a tunnel is  
 “entitled to the possession of all blind veins he discovers  
 “in his tunnel to the same extent along the veins as if he  
 “had discovered them at the surface, and a holding that  
 “by the discoveries and locations of others, subsequent to  
 “the commencement of his tunnel and before it reaches  
 “the veins at all, he may be deprived of every portion of  
 “them, except possibly, the small segments within the bore  
 “of the tunnel.”

The conclusions reached by the court may be thus stated:—

(1) The location of a tunnel site, followed by the prosecution of work thereon with reasonable diligence, gives to the tunnel locator an inchoate right to all hitherto unknown or undiscovered veins which cross the line of the tunnel and are discoverable therein;

(2) That upon discovery in the tunnel, the tunnel locator will be entitled to fifteen hundred feet along the length of the vein, computed in either direction from his tunnel discovery, and that this right cannot be impaired by a discovery and location from the surface, junior, in point of time, to the inception of the tunnel right;

(3) The state statute of Colorado, fixing the limit in length at two hundred and fifty feet on each side of the tunnel line, is superseded by the act of congress;

(4) In determining what length on the vein is allowed to the tunnel discoverer, the court resorts to section twenty-three hundred and twenty of the Revised Statutes, but decides that such section performs no other function in determining the rights of the tunnel discoverers.

The court also holds, that the inchoate right given to the tunnel locator only extends to veins that strike the line of the tunnel and are discovered in the tunnel. Others may discover and hold all veins within fifteen hundred feet of the line of the tunnel that do not strike or cross its lines, and all that do strike it that are not discovered in it.

The reasoning applied by the court which, in its judgment, justified the results reached may be thus epitomized:—

(A) Section twenty-three hundred and twenty-three construes itself, and it is unnecessary to resort to public policy in aid of its interpretation;

(B) If the question of public policy is to be resorted to, the rights guaranteed to the tunnel locators are in accord with such policy, which is to encourage the discovery and development of the mineral resources of the country;



(c) The work of driving tunnels thousands of feet into the side of a mountain for the purpose of discovering a vein, or lode, that is not known to exist at all, is an extremely hazardous and expensive undertaking; that this is common knowledge, and congress must be taken to have had this knowledge when they enacted the law. They must have known that such a hazardous enterprise was not likely to be undertaken unless rewards commensurate with the risk and expense were offered.

It is to be added, by way of a side light on this decision, that the discovery on which the Vestal location was based was not upon the vein which was discovered in the tunnel. The right of the tunnel locator to the vein discovered in the tunnel, in so far as it was found within the Vestal location, was also defended on the ground that it was a cross lode, and that under the rule in Colorado, which we will discuss fully in a subsequent chapter, owners of cross lodes may follow their vein into, and underneath, even a prior location.

§ 489. **Tunnel locations before the supreme court of the United States.**—The case of *Glacier Mountain Silver Mining Company v. Willis*<sup>1</sup> was an action of ejectment, wherein the plaintiff sought to recover possession of the Silver Gate tunnel claim, located in 1865, alleged to be five thousand feet long and five hundred feet wide, described by metes and bounds, which was alleged to embrace many valuable lodes, or veins, which had been discovered, worked, and mined by the plaintiff and his grantors. Possession and payment of taxes for a period in excess of the statute of limitations prescribed by the laws of Colorado were averred, together with a general allegation of ownership of the tunnel claim described. The ouster alleged was an entry by defendants upon the premises and *into the tunnel*, claiming said tunnel as the War Eagle, and the location of a lode claim across the tunnel, claiming a discovery *in the tunnel* of such lode, which they named the Tempest.

<sup>1</sup> 127 U. S. 471.

A special demurrer was interposed upon the following grounds:—

- (1) Insufficient description of the property sought to be recovered;
- (2) Insufficient description of the lodes for which possession was asked;
- (3) Failure to show any valid subsisting pre-emption or location of the tunnel site;
- (4) That the claim of plaintiff to a strip of ground five thousand feet in length by five hundred feet in width as a tunnel site is unwarranted and unprecedented, and was not, at the date of said pretended location, nor at any subsequent time, authorized by any local, state, or congressional law.

The court below sustained the demurrer. The supreme court of the United States, in reversing the judgment, held:—

- (1) That the description in the complaint was sufficient, as it enabled the sheriff, in case of recovery, to execute a writ of possession, or a surveyor to ascertain the exact limits of the location;
- (2) As to the second ground of demurrer, the court held, that though the lodes alleged to be embraced within the tunnel site location are not each separately described, the statement in the complaint that all the lodes in the tunnel claim have been worked and mined, comprehends every part of the property for the recovery of which the action is brought;
- (3) That the claim for five thousand feet in length was void only as to the excess over three thousand feet;
- (4) The tunnel location having been made prior to the passage of the act of May 10, 1872, the rights flowing therefrom are to be determined under the local rules and customs in force at the time the location was made.

It is manifest that this decision sheds no light upon the subject. We refer to it for the reason, that in several of

the decisions heretofore cited, it was stated that the conclusions there reached were not opposed to the doctrine of the Glacier Mountain-Willis case. This is quite true, for the simple reason, that the questions which we are now considering were not involved, discussed, or decided.

§ 490. **Opinions of the land department.**—We note the following views expressed by the land department:—

(1) A claim under a tunnel location is a mining claim, and should adverse a junior applicant for patent for a lode within its claimed limits;<sup>1</sup>

(2) Prospecting for lodes not previously known to exist is prohibited on the line of the tunnel (*i. e.* its width) while work on the tunnel is being prosecuted with reasonable diligence;<sup>2</sup>

(3) In no case can a tunnel proprietor record a claim so as to absorb the actual or constructive possession of other parties, on a lode which had been discovered and claimed outside the *line* of the tunnel before the discovery thereof in the tunnel.<sup>3</sup>

We have heretofore noted the decisions of this department defining the *line* of the tunnel to be the width of the bore.<sup>4</sup>

§ 491. **Conclusions.**—It is quite manifest, that the decisions and rulings heretofore reviewed are so conflicting, and the results reached so divergent, that it is impossible to formulate any rule which will be acceptable to all the courts. The questions involved are essentially federal in their nature, and will only cease to be so when the supreme court of the United States shall have finally determined them.<sup>5</sup>

<sup>1</sup> Secretary Kirkwood, *Bodie Tunnel & M. Co. v. Bechtel Cons.*, 1 L. D. 584.

<sup>2</sup> Commissioner Williamson, *In re David Hunter, Copp's Min. Lands*, 231.

<sup>3</sup> Commissioner Drummond's letter to Chaffee, *Copp's Min. Dec.* 144. See, also, *Corning Tunnel Co. v. Pell*, 3 *Copp's L. O.* 130.

<sup>4</sup> See, *ante*, § 473.

<sup>5</sup> *State of Kansas v. Bradley*, 26 Fed. 289; *Bluebird M. Co. v. Largey*, 49 Fed. 291.

The conclusions reached by the state court of last resort in construing the statutes of the state within which it exercises jurisdiction, if the rule of interpretation has been uniform and there is no conflict with the federal constitution or laws, are binding upon all other courts, state and federal. But its decisions construing federal statutes, have, as such, no binding force outside of courts of that particular state. They may be accepted as precedents if the reasoning upon which they are based commends itself to other tribunals, but not otherwise. The decisions of the federal courts upon the construction of federal statutes are, when the construction has been approved by the supreme court of the United States, unquestionably binding upon all tribunals. But the state courts are not compelled to follow a rule of interpretation adopted by a circuit court, or a circuit court of appeals of the United States. In fact, the decision in one circuit is not necessarily controlling in other circuits. While, in cases arising out of infringement of patents, comity requires that a rule announced in one circuit, involving a particular patent and its infringement, shall be followed in all other circuits where the same patent is involved, we do not understand that this doctrine extends to any other class of cases. So we cannot say, that either the supreme court of a state or the circuit court of appeals are courts of unequal dignity, and that a precedence should be given to the decisions of one over the other, even upon federal questions.

Therefore, while the true rule of interpretation of the law, as expounded in the several jurisdictions, is left in a state of uncertainty, we are persuaded that the field of discussion is an open one, and we are at liberty to investigate on independent lines, or to select the rule announced in one court in preference to another. In doing so, we may not be able to add anything to the weight of the argument presented in favor of the rule accepted, or to satisfactorily disclose inherent infirmities in the reasoning applied to that with which we may not coincide. If we do not add

anything to the development of the subject, or demonstrate that there are cogent reasons for the views adopted by us beyond those already advanced and considered by the several courts, our arbitrary sanction given to one rule or the other will not turn the scales, although they be ever so evenly balanced.

We have heretofore observed, that the courts and the land department have reached a harmonious conclusion as to what is meant by the *line* of the tunnel. It is the width marked by the exterior sides of the tunnel throughout the length of, and in the direction claimed.<sup>1</sup> Recurring to the language of the statute: "Locations on the line of such tunnel of veins, or lodes, not appearing on the surface, made by other parties after commencement of the tunnel and while the same is being prosecuted with reasonable diligence, shall be invalid."

It thus appears that locations upon the surface contiguous to the line are not inhibited. They may therefore be lawfully made anywhere, so that the *lines of the location* do not intersect the *line* of the tunnel. What was the object of this inhibition? A valid perfected lode mining location is a grant of the exclusive right of enjoyment of the surface and everything within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface.

If a mining location could be permitted to cross the line of the tunnel, it would effectually cut off the tunnel claimant's rights to drive his tunnel through and beyond it. Such a location, if permitted, made across the tunnel line a short distance from its face, would effectually deprive the tunnel locator of a right to explore, by means of his tunnel, any considerable portion of the mountain. In this aspect of the case, the estate given to the tunnel locator is in the nature of an easement, or right of way, to the entire length claimed for discovery purposes.

<sup>1</sup>See, *ante*, § 473.

We are aware, that it is contended that any mining proprietor has a right to tunnel underneath his neighbor, and that this class of easements is granted by local rules and customs independent of questions of priority. Whatever may have been the rule sanctioned by local regulations during the period when all engaged in mining on the public lands were technically trespassers, since a perfected mining claim has been given the dignity of an estate of freehold no such right exists. Easements and rights of way may be acquired over the public domain, but after it passes into private ownership, no such rights can be asserted, except for public purposes or for limited private uses, if provided for by the state constitution. In such cases, unless consent is obtained, condemnation proceedings are necessary.<sup>1</sup> Therefore, it is not unreasonable to suggest, that congress intended to withdraw the line of the tunnel from any subsequent appropriation, that the tunnel proprietor might have a clear right of way throughout the entire length claimed. Congress might have accomplished the same result by permitting locations to be made regardless of the tunnel line, preserving to the tunnel claimant a right of way; but it adopted the more certain and direct method of reserving a strip the width of the tunnel for the length claimed.

It will be observed, that the privilege granted, based upon a discovery in the tunnel, is not only granted to one who locates a tunnel site for discovery purposes, but the same rights are given to those who develop located claims by means of a tunnel. Let us illustrate: A. locates a mining claim based upon a surface discovery. Its position is advantageous for development by tunnel. He projects and locates such a tunnel, and thereafter work done therein is considered as work performed upon the located claim. If the construction of the act announced by the circuit court of appeals is correct, he not only perpetuates his estate in the located lode by prosecuting his tunnel, but is

<sup>1</sup> See, *ante*, §§ 252-264. See, *post*, ch. viii., of this title.



enabled to practically withdraw from exploration the surface for a width of fifteen hundred feet on each side of his tunnel, for the distance between the tunnel face and the boundaries of the located lode, and for such a distance beyond it as will cover the three thousand feet measured from the face.

We say *practically* withdraws such area, for the reason, that no subsequent appropriator would be safe in exploiting anything within these limits, for the reason that his located lode *might* at some time be cut by the tunnel.

To say that lodes that would not be cut by the tunnel may be located within this area, is to give but little encouragement to the surface prospector. It might take several years to determine this. At the rate of three hundred feet per annum, which in hard ground might require over six months to excavate, it would take ten years before the fact would be developed to a certainty, so as to give the prospector on the surface any assurance in the ownership of anything definite. A much less rate of speed would probably satisfy the law on the subject of diligence. Such a tunnel may be nothing more than a threat, but it is sufficient, if the doctrine of the circuit court of appeals is upheld, to drive away others, and practically secure to tunnel locators a monopoly of mining lands in a mineral belt. If such a rule is to obtain, what is the use of attempting any surface exploration? Any ordinary mining camp could be easily covered by tunnel projectors, who might take advantage of the practical withdrawal effected by their tunnel locations to use the idle six months, which the statute seems to permit, to make surface explorations and discoveries, to the exclusion of every one else.

A glance at a map of the surveyed mining claims in the region of Cripple Creek, Colorado, a section of which is shown in this treatise in connection with the subject of "cross lodes," will demonstrate what appalling results may be accomplished by accepting the doctrine of the Enterprize-Rico-Aspen case.



It is asserted that the object of the tunnel act is to encourage the development of the mining resources. As a matter of fact, the discovery and development of such resources, stimulated by the rewards offered by the mining laws to individual prospectors, have been accomplished almost entirely by discovery and development from the surface.

Any construction of the law which has a tendency to limit the number who may be permitted to engage in the search for the precious metals, and to concentrate the privileges in the hands of the few, retards such development.

The supreme court of the United States, speaking through Judge Field, has said:—

“What is termed the policy of the government with reference to any particular legislation, is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.”<sup>1</sup>

And yet we find the same court, in a later case, speaking through Justice Miller in reference to the different classes of mineral deposits, and the variation in the government price between lode and placer entries, announcing that this distinction was not made “in special regard to the revenue of the government from this source, but to prevent too much of this rich public mineral land falling into the hands of one successful explorer, to the exclusion of others.”<sup>2</sup>

As heretofore observed, the tunnel law itself permits locations anywhere, except on the *line* of the tunnel. Such location must be based upon a discovery. A location to be valid must be valid at the time it is made.<sup>3</sup> If valid, an estate vests which cannot be divested by subsequent discoveries by others. It is useless to say that a location may be made, subject to the title to the discovered lode being

<sup>1</sup> Hadden v. The Collector, 5 Wall. 107, 111.

<sup>2</sup> Reynolds v. Iron S. M. Co., 116 U. S. 687, 695.

<sup>3</sup> See, *ante*, § 363.

divested by a subsequent discovery of the same vein by some one else.

We can conceive of the existence of geological conditions which congress had in mind when the tunnel law was passed. In many localities, veins occupying a more or less vertical position in the earth are capped with country rock. Sedimentary deposits of limestone frequently lie unconformably upon the blind apices of mineral veins. A slight exposure caused by fortuitous erosion induces the miner to locate and exploit it. A hundred vertical shafts might be sunk within as many acres, with fruitless results. Discovery from the surface was the rule. The tunnel act gave to prospectors, under such circumstances, the assurance, that if they projected a tunnel, which was the most rational, if not the exclusive, method of ascertaining the existence of such veins, they would be permitted to utilize any discovery made to the same effect as if they had been discoverable from the surface.

If they were discoverable from the surface, the tunnel act was not intended to apply. This seems to be borne out by the provisions of the law authorizing veins appearing on the surface to be located across the tunnel line.

The rule announced by the circuit court of appeals places the meagre, scant provisions of the law on the subject of tunnels on a higher plane than the other portions of the statute which provide a complete system for the discovery and location of lodes. It resorts to one clause of the statute for the purpose of defining the length on the lode discovered in the tunnel, but rejects all the other provisions. It violates the fundamental principle which is the basis of mining jurisprudence in all countries, that discovery is the basis and origin of all mining rights.

It seems to us that the rule, that priority of discovery establishes a priority of right, so permeates the federal mining system that it will be impossible to sustain the extraordinary privileges sanctioned by the decision under consideration without shattering the entire system and sapping its very foundation.

Let us illustrate by means of a diagram certain other phases of this tunnel law considered in the light of the doctrine applied by the circuit court of appeals. A. locates a tunnel site on the line  $x x$ , and perfects his location prior to the surface discoveries and locations indicated by B., C., and D. The veins of these surface locators—any one of

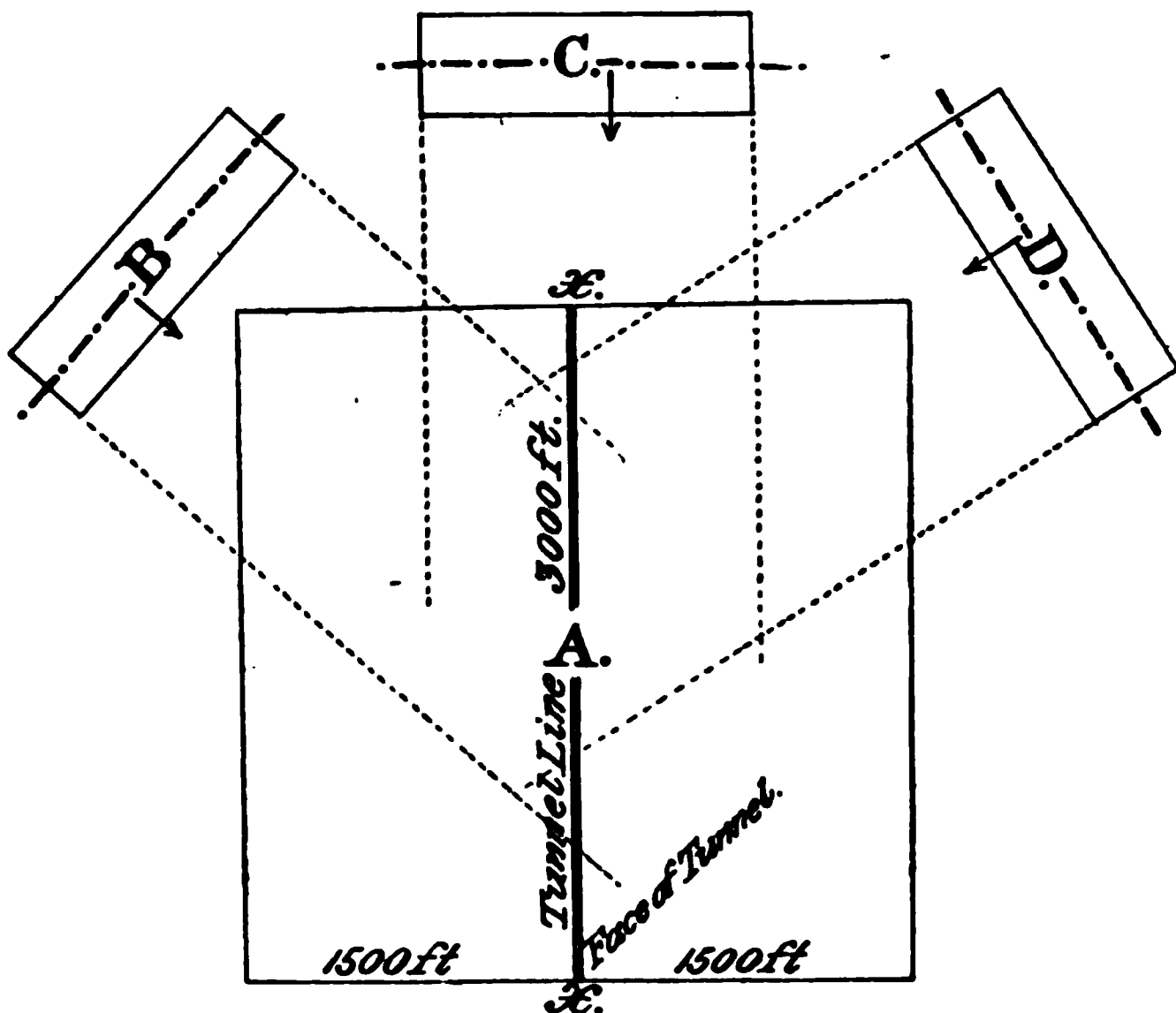


FIGURE 24.

them may be singled out for illustrative purposes—dip in the direction of the tunnel, as indicated by the arrows and extended end line planes. It is very evident that the planes of each one of these veins will, on their downward courses, intersect the plane of the tunnel, and it requires no stretch of the imagination to assume that at some point, as the tunnel is driven into the hill, it may cut one or all of these veins. What will be the rights of the parties? The angle at which the tunnel must intersect these veins is not specified in the law. Nor does the law specify in terms that the apex of the vein must cross the line of the tunnel.

According to the doctrine of the supreme court of Colorado, in the Ellet-Campbell case, heretofore considered, these veins may be located by posting a notice at the mouth of the tunnel. What are the tunnel locator's rights upon these discovered veins? How far upward may they be followed from the discovery point? Is there to be a horizontal partition between A. and the surface locators? If so, where is the plane to be drawn?

These veins may all be encountered in the tunnel within three thousand feet from its face. If A. may locate them by describing a parallelogram on the surface vertically over his point of discovery in the tunnel, he locates on the dip of the vein. What right has he to locate anything, unless that right is referable to section twenty-three hundred and twenty of the Revised Statutes? What becomes of that maxim of the law having its origin in this section, which says, that a location cannot lawfully be made on the middle part of a vein, or otherwise than on the top, or apex?<sup>1</sup>

In the absence of the locations by B., C., or D., why should A. not be permitted to locate these apices, if the veins are cut by his tunnel, bearing such locations upon his tunnel discoveries? When the statute says that he shall be entitled to veins within three thousand feet of the tunnel, it must mean that he is entitled to such veins as are discovered within that distance. The statute does not limit his rights to lodes having their *apices* within three thousand feet of such face.

Every theory we adopt in considering this part of the mining statutes leads us to chaos and inextricable confusion, except the one that we have suggested, that the entire body of the mining law is to be taken by its four corners and construed; that priority of discovery establishes a priority of right; that a tunnel is a means of discovery; that the chances of making such discovery by tunnel of the class of veins contemplated by the statute

<sup>1</sup>See, *ante*, § 364, and cases cited in note 4, p. 469.

are so much greater than the possibilities flowing from surface exploration that they afford sufficient inducement and promise of reward to the tunnel proprietor to proceed with his enterprise; that a location based upon any discovery can only be made upon the top, or apex, and whoever succeeds in making such location peaceably and in good faith before any one else acquires a right by virtue of an antecedent discovery is entitled to all the rights and privileges conferred upon a valid location. Such rights may not be disturbed or invaded by any subsequent discovery of the same vein on its dip.

## CHAPTER V.

### COAL LANDS.

#### ARTICLE I. INTRODUCTORY.

#### II. MANNER OF ACQUIRING TITLE TO COAL LANDS.

#### ARTICLE I. INTRODUCTORY.

§ 495. Classification of coal as a mineral — History of legislation — Characteristics of the system.

§ 496. Rules for determining character of land.

§ 497. Geographical scope of the coal land laws.

§ 495. **Classification of coal as a mineral — History of Legislation — Characteristics of the system.**—As observed in a previous section,<sup>1</sup> prior to the passage of the coal land act of July 1, 1864, the land department did not regard coal as a mineral within the meaning of the prior legislation of congress, yet this substance, although essentially of vegetable origin, has, generally speaking, been classified as mineral, as it came within the etymological signification of the term, being obtained from underground excavations, or “mines.”<sup>2</sup> The act above referred to<sup>3</sup> was the first legislation by congress providing a method for the disposal of coal lands. It was followed in the succeeding year by a supplemental act,<sup>4</sup> and in 1873 congress passed a law which is the basis of the existing system.<sup>5</sup>

Whatever may have been the rule as to the classification of coal lands prior to the passage of the act of 1864,

<sup>1</sup> See, *ante*, § 140.

<sup>2</sup> See, *ante*, § 88.

<sup>3</sup> 13 Stats. at Large, 343.

<sup>4</sup> March 3, 1865, 13 Stats. at Large, 529.

<sup>5</sup> Rev. Stats., §§ 2347, 2352.

since that date they are classified as mineral by legislative construction.<sup>1</sup>

As heretofore noted,<sup>2</sup> lands containing coal are not, as a rule, excepted from the operation of the railroad grants,<sup>3</sup> nor are they considered by the department as mineral lands within the meaning of the act of June 3, 1878,<sup>4</sup> granting the privilege of cutting timber upon mineral lands of the public domain in certain states.<sup>5</sup>

It will serve no useful purpose to retrace the history of congressional legislation on this subject. The coal land laws form a system peculiar to themselves, having nothing in common with the general mining laws, and strictly speaking, are not *in pari materia*. The ownership and possession of this class of public lands were never subject to regulation by local rules and customs, and from the passage of the first act in relation to them to the present time, the method of acquiring title to them has been simple, and unaccompanied by the perplexities that have arisen in the administration of the laws relative to lands containing lodes and placers. Such questions as have arisen in reference to coal have been adjudicated entirely within the land department. No controversies arising out of the proper constructions of these laws are, in the process of obtaining title, relegated to the courts for determination. The coal land system, like that applicable to homestead, pre-emption, and other agricultural entries, is administered by the executive department of the government. For this reason we note the almost total absence of judicial decisions upon the subject, and must look exclusively to the land department for the rules of interpretation.

§ 496. Rules for determining character of land.—  
While the system prescribing the method for obtaining

<sup>1</sup> United States v. Mullian, 7 Saw. 466; S. C. on appeal, 118 U. S. 271.

<sup>2</sup> See, *ante*, § 152.

<sup>3</sup> See, Rocky Mountain C. & I. Co., 1 Copp's L. O. 1.

<sup>4</sup> 20 Stats. at Large, 88.

<sup>5</sup> Instructions to Timber Agents, 2 L. D. 827.



title to lands containing coal is different from that applicable to other mineral lands, the rules for determining whether a given tract is subject to entry under the coal land laws or not are analagous to those applicable to other classes of mineral deposits.<sup>1</sup>

They may be thus formulated with special reference to coal:—

(1) All classes of coal deposits, whether anthracite, bituminous, lignite, or cannel, are embraced within the coal land laws;<sup>2</sup>

(2) It must be shown, that as a present fact the land is more valuable for the purpose of its coal product than for any other purpose;<sup>3</sup> that the substance exists therein in paying quantities,<sup>4</sup> or that it is sufficiently valuable to be worked as a mine.<sup>5</sup>

These facts must be shown by the actual production of coal,<sup>6</sup> or by satisfactory evidence that, taking the tract as a whole, coal exists therein in sufficient quantities to make the same more valuable for mining than for agricultural purposes.<sup>7</sup>

The extent of the deposit may be shown by the testimony of geological experts and practical miners, taken in connection with the actual production of coal from some portion of the tract.<sup>8</sup>

In determining these facts, means of transportation cannot be taken into consideration as affecting the value of the coal shown to exist.<sup>9</sup>

That lands in the near vicinity,<sup>10</sup> or even those directly

<sup>1</sup> See, *ante*, § 98.

<sup>2</sup> Sickles Min. Dec., 397.

<sup>3</sup> Hamilton v. Anderson, 19 L. D. 168; Com'rs of Kings County v. Alexander, 5 L. D. 126.

<sup>4</sup> Smith v. Buckley, 15 L. D. 321.

<sup>5</sup> Jones v. Driver, 15 L. D. 514.

<sup>6</sup> Hamilton v. Anderson, 19 L. D. 168; Com'rs of Kings County v. Alexander, 5 L. D. 126.

<sup>7</sup> Mitchell v. Brown, 3 L. D. 65; Savage v. Boynton, 12 L. D. 612.

<sup>8</sup> Rucker v. Knisley, 14 L. D. 113.

<sup>9</sup> Smith v. Buckley, 15 L. D. 321.

<sup>10</sup> *In re Williams*, 11 L. D. 462; Scott v. Sheldon, 15 L. D. 361.

adjoining, are shown to contain coal,<sup>1</sup> is insufficient to establish the character of a tract upon which no coal has been developed.<sup>2</sup>

Mere outcroppings<sup>3</sup> or other surface indications will not, in the absence of proof of commercial value of the deposit, prevent the entry of such lands under the pre-emption or homestead laws.<sup>4</sup>

But it is not necessary to show actual development on each forty-acre subdivision,<sup>5</sup> nor upon all parts of a forty-acre tract.<sup>6</sup>

When, however, a conflict arises between an agricultural and coal claimant, the character of the land to the extent of the entire conflict area is involved, and, necessarily, proofs of a more specific character would be required than in the case of an *ex parte* application to enter under the coal laws.

The rules governing hearings to establish the character of lands are found in "General Land Office Regulations," issued October 31, 1881.<sup>7</sup>

The discovery of coal in paying quantities on land embraced within a homestead claim, precludes the completion of the entry;<sup>8</sup> but discovery after purchase, under commuted homestead entry, will not defeat the issuance of the patent.<sup>9</sup>

§ 497. **Geographical scope of the coal land laws.**—The system regulating the pre-emption and sale of coal lands has substantially the same geographical scope as the general mining laws. It is in practical operation wherever

<sup>1</sup> *Com'rs of Kings County v. Alexander*, 5 L. D. 126; *In re Archuleta*, 15 Copp's L. O. 256.

<sup>2</sup> See, also, *Dughi v. Harkins*, 2 L. D. 721.

<sup>3</sup> *Frees v. State of Colorado*, 22 L. D. 510.

<sup>4</sup> *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307.

<sup>5</sup> *Hamilton v. Anderson*, 19 L. D. 168; *McWilliams v. Green River Coal Assn.*, 23 L. D. 127.

<sup>6</sup> *State of Montana v. Buley*, 23 L. D. 116.

<sup>7</sup> 1 L. D. 688. See appendix.

<sup>8</sup> *Harnish v. Wallace*, 13 L. D. 427; *Dickinson v. Capen*, 14 L. D. 426.

<sup>9</sup> *Arthur v. Earle*, 21 L. D. 92.

coal is found in the precious-metal-bearing states and territories,<sup>1</sup> with the exceptions hereinafter noted, and in Arkansas, Louisiana, and Florida. As heretofore noted, Alabama,<sup>2</sup> Michigan, Minnesota, Wisconsin, Kansas, and Missouri<sup>3</sup> are excepted from the operation of the federal mining laws. Nor is the system operative in Oklahoma.<sup>4</sup>

The District of Alaska, however, is not subject to the coal land laws, as the act providing a civil government for this district<sup>5</sup> only extends the operation of the laws of the United States relating to mining claims, and appropriated coal lands are not "mining claims" within the meaning of the law.

## ARTICLE II. MANNER OF ACQUIRING TITLE TO COAL LANDS.

§ 501. Who may enter coal lands.	utes, section twenty-three
§ 502. Different classes of entries.	hundred and forty-eight.
§ 503. Private entry under Revised Statutes, section twenty-three hundred and forty-seven.	§ 505. The declaratory statement.
§ 504. Preferential right of purchase under Revised Stat-	§ 506. Assignability of inchoate rights.
	§ 507. The purchase price.
	§ 508. The final entry.
	§ 509. Conclusions.

**§ 501. Who may enter coal lands.**—Entries of coal lands may be made by individuals or associations of persons. In the case of an individual, he must be above the age of twenty-one years and a citizen of the United States, or he must have declared his intention to become such.<sup>6</sup>

At one time, the department held that married women could not make entry of this class of lands,<sup>7</sup> but this con-

<sup>1</sup> See, *ante*, § 81.

<sup>2</sup> For method of acquiring coal lands in Alabama, see, Circ. Instructions, 10 Copp's L. O. 54. *In re Robert Lalley*, *Id.* 55.

<sup>3</sup> See, *ante*, § 20.

<sup>4</sup> Act of March 3, 1891, § 16, 26 Stats. at Large, 1026.

In § 81 we have erroneously included this territory in the list of precious-metal-bearing states which are subject to the general mining laws.

<sup>5</sup> May 17, 1884, 23 Stats. at Large, 24.

<sup>6</sup> Rev. Stats., § 2347.

<sup>7</sup> *In re Nichol*, 15 Copp's L. O. 255.

struction of the law, which was manifestly erroneous,<sup>1</sup> is no longer followed.

An association of persons, as the term is used in the coal land laws, is uniformly construed by the department to include corporations; but each individual of such association, whether incorporated or not, must possess the requisite qualifications. The law expressly so provides. The ownership, by one member of an association seeking to enter coal lands, of interests in other lands claimed under the coal land laws disqualifies the entire association.<sup>2</sup> The right to purchase coal lands can be exercised but once.<sup>3</sup>

If an association of persons makes a coal entry embracing a less area than it might have applied for, such entry is a bar to a second one.<sup>4</sup> Where a valid reason therefor exists, such as may be instanced by a case where the applicant was unable to complete an asserted right by reason of successful adverse claims to the land sought to be entered, the cancellation of his declaratory statement would be without prejudice to a second application for other lands.<sup>5</sup> The rule applies, generally speaking, to those who have perfected their entries, or when the failure to complete the entry is the result of their own neglect.<sup>6</sup> The rule has no application to a case where one buys, and, prior to entry, sells a preferential right.<sup>7</sup>

A coal entry may be made by one qualified person for the benefit of another,<sup>8</sup> provided the latter is himself qualified and has not exhausted his privilege. An entry sought to be made by one for the benefit of a disqualified person,<sup>9</sup>

<sup>1</sup> See, *ante*, § 224.

<sup>2</sup> *In re Hawes*, 5 L. D. 224, *Kerr v. Utah-Wyoming Imp. Co.*, 2 L. D. 727.

<sup>3</sup> *In re Kimball*, 3 Copp's L. O. 50; *In re Eiseman*, 10 L. D. 539; *In re Dearden*, 11 L. D. 351; *In re Smith*, 16 Copp's L. O. 112; *In re Negus*, 11 L. D. 32.

<sup>4</sup> *In re Kimball*, 3 Copp's L. O. 50.

<sup>5</sup> *In re Eiseman*, 10 L. D. 539; *In re Dearden*, 11 L. D. 351; *In re Conner v. Terry*, 15 L. D. 310.

<sup>6</sup> *In re Hutchings*, 4 Copp's L. O. 142; *In re John McMillan*, 7 L. D. 181; *In re Smith*, 16 Copp's L. O. 112.

<sup>7</sup> *In re McConnell*, 18 L. D. 414.

<sup>8</sup> *Lipscomb v. Nichols*, 6 Colo. 290. See, also, *Union Coal Co.*, 17 L. D. 351; *In re Durango L. & C. Co.*, 18 L. D. 382, *In re Allen*, 8 L. D. 140.

<sup>9</sup> *In re Adolph Peterson*, 6 L. D. 371; *Conner v. Terry*, 15 L. D. 310.

or for one who, being originally qualified, has previously exhausted his rights,<sup>1</sup> or when made in the interest of a corporation or association of persons, some of whom are either disqualified or have once availed themselves of the privilege,<sup>2</sup> is a fraud upon the government, and may be annulled upon proper proceedings in that behalf. Contracts whereby such a result is sought to be accomplished are contrary to public policy, and therefore void.<sup>3</sup>

However, an entry by an association of persons, all of whom are qualified at the date of entry, is not vitiated by the fact that at some point of time previous thereto one or more of them was disqualified.<sup>4</sup>

**§ 502. Different classes of entries.**—Coal lands are disposed of:—

(1) By ordinary private entry, under the provisions of section twenty-three hundred and forty-seven of the Revised Statutes;

(2) By pre-emption or preference right of purchase, under section twenty-three hundred and forty-eight.

The two classes of entries have the following features in common:—

(A) The persons or associations must possess the same qualifications;

(B) The purchase price to be paid upon final entry is the same;

(C) Final entries may only be made upon surveyed lands. There can be no segregation of fractional parts;<sup>5</sup>

(D) The tracts applied for must be contiguous.<sup>6</sup>

<sup>1</sup> *McGillicuddy v. Tompkins*, 14 L. D. 633.

<sup>2</sup> *United States v. Trinidad Coal & C. Co.*, 137 U. S. 160.

<sup>3</sup> *Johnson v. Leonhard*, 1 Wash. St. 564.

<sup>4</sup> *Kerr v. Utah-Wyoming Imp. Co.*, 2 L. D. 727; *Kerr v. Caflton*, 10 Copp's L. O. 255.

<sup>5</sup> *Mitchell v. Brown*, 3 L. D. 65; *In re Cameron*, 10 L. D. 195; *In re Lyon*, 20 L. D. 556.

<sup>6</sup> *In re Masterson*, 7 L. D. 172; S. C. on review, *Id.* 577; *Kendall v. Hall*, 12 L. D. 419.

**§ 503. Private entry under Revised Statutes, section twenty-three hundred and forty-seven.**—The right to enter coal lands under section twenty-three hundred and forty-seven of the Revised Statutes may be exercised upon surveyed lands without previous occupation or improvement. Necessarily, the lands sought to be entered must be vacant, and otherwise unreserved and unappropriated. In other words, they must be public lands.<sup>1</sup> They may only be applied for by government subdivisions and in limited quantities; that is, an individual may not acquire to exceed one hundred and sixty acres, and an association of persons not to exceed three hundred and twenty acres.

To obtain title to lands under this section, the applicant is required to file with the register of the proper land office a verified application,<sup>2</sup> describing the lands sought to be purchased, his qualification under the law to make the entry, and such other facts as to the character and *status* of the land as will establish in the applicant a *prima facie* right of purchase.

If the land is clear on the tract books, the register certifies the fact to the receiver, and the price is determined according to the rule announced in a subsequent section.<sup>3</sup> Payment must then be made, whereupon the final certificate is issued, and in due time the patent follows.

Private entry will not be allowed so as to embrace one tract in the capacity of an assignee, and another under the individual right of the purchaser.<sup>4</sup>

Until application is made to enter and purchase under this section, the claimant has no right which is worthy of recognition. His possession, if he has any, must yield to one who complies with the law and files upon the land.<sup>5</sup>

**§ 504. Preferential right of purchase under Revised Statutes, section twenty-three hundred and forty-eight.**—In order to exercise the preferential right of purchase

<sup>1</sup> See, *ante*, § 112.

<sup>2</sup> See form in Circ. Instructions, 1 L. D. 688. See appendix.

<sup>3</sup> See, *post*, § 507.

<sup>4</sup> *In re Ludlow*, 17 L. D. 22.

<sup>5</sup> *Leheart v. Dunker*, 4 L. D. 522.

granted by section twenty-three hundred and forty-eight, there are two essential prerequisites:—

(1) The applicant must be in the actual possession of the lands applied for;<sup>1</sup>

(2) He must, prior to final entry, have opened and improved the mines situated thereon.<sup>2</sup>

The improvements made must be such as to clearly indicate good faith.<sup>3</sup>

In determining what constitutes good faith, the applicant's degree and condition in life may be considered.<sup>4</sup>

Priority of possession and improvement, followed by proper filing and development of the mine in good faith, are the foundation of the preferential right.<sup>5</sup>

This right may be exercised by an individual or an association of persons. When exercised by an individual, it is limited to one hundred and sixty acres, and by an association of persons, ordinarily to three hundred and twenty acres. Entries by associations consisting of not less than four persons may, however, be extended to six hundred and forty acres, after they shall have expended not less than five thousand dollars in working and improving such mines.

The preferential right may be initiated by entering into possession and improving unsurveyed lands. The right, however, may only be perfected after the lands shall have been surveyed and the township plat filed in the local land office.

**§ 505. The declaratory statement.**—If the preferential right is initiated upon surveyed lands, the claimant must present to the register of the proper land office, within sixty days after the date of actual possession, and the

<sup>1</sup> *In re Negus*, 11 L. D. 32; *Walker v. Taylor*, 23 L. D. 110; *McDaniel v. Bell*, 9 L. D. 15.

<sup>2</sup> *Walker v. Taylor*, 23 L. D. 10; *Quimette v. O'Conner*, 22 L. D. 538.

<sup>3</sup> *In re Negus*, 11 L. D. 32.

<sup>4</sup> *Watkins v. Garner*, 13 L. D. 414.

<sup>5</sup> *Bullard v. Flanagan*, 11 L. D. 515.



commencement of improvements upon the land, his declaratory statement of the facts upon which he bases his right. Where the lands upon which the right is initiated by occupation and development are unsurveyed, the time within which the declaratory statement is to be filed commences to run from the date the approved township plat is received at the local land office.<sup>1</sup> Failure to file this instrument within the time specified renders the land subject to entry by another, if he has complied with the law;<sup>2</sup> but in the absence of an adverse claimant, the right to complete the entry is not forfeited.<sup>3</sup>

A second filing for the same tract will not be allowed to one who has failed to comply with the law in the first instance.<sup>4</sup>

The statement must be verified by the oath of the applicant. This duty cannot be delegated to others;<sup>5</sup> but after the same is filed, the subsequent acts required to complete the entry may be performed by a duly authorized agent, acting under a power of attorney.<sup>6</sup>

§ 506. **Assignability of inchoate rights.**—An inchoate right, or privilege, flowing from an accepted application or declaratory statement may be assigned to one who possesses the necessary legal qualifications;<sup>7</sup> but such assignment, if the assignee perfects the entry, would extinguish the right of both parties to purchase lands under the coal land laws, and both would thereafter be disqualified from making further entries.

<sup>1</sup> Rev. Stats., § 2349.

<sup>2</sup> *Brennan v. Hume*, 10 L. D. 160; *O'Gorman v. Mayfield*, 19 L. D. 508.

<sup>3</sup> *In re Grunsfeld*, 10 L. D. 508.

<sup>4</sup> *Id.*

<sup>5</sup> *White Oaks Imp. Co.*, 13 Copp's L. O. 159; *In re Hallowell*, 2 L. D. 735.

<sup>6</sup> Par. 34, Circ. Instructions. See appendix.

For forms of declaratory statements, and the manner of procedure generally, see the Circ. Instructions, which appears in full in the appendix.

<sup>7</sup> *Kerr v. Carlton*, 10 Copp's L. O. 255; par. 37, Circ. Instructions. See appendix.

Where such assignments are made, the purchaser may avail himself of the improvement and development of his assignor.

§ 507. **The purchase price.**—The price fixed by law to be paid for coal lands depends upon the situation of the lands with respect to completed railroads.<sup>1</sup> If within fifteen miles of such road, the entryman must pay at the rate of twenty dollars per acre. If more than fifteen miles, ten dollars per acre.

The *status* of the land at the date of final proof and payment, with respect to this distance, determines the price thereof, irrespective of the *status* when the preference right is initiated or acquired.<sup>2</sup>

Where the land lies partly within fifteen miles and in part outside such limit, the maximum price must be paid for all legal subdivisions, the greater part of which lie within fifteen miles of such road.<sup>3</sup>

The term “completed railroad” is construed by the department to mean one which is actually constructed on the face of the earth.<sup>4</sup>

Final proofs must be made, and the lands must be paid for, within one year from the time prescribed for filing the respective claims. Upon failure to do so, the lands are subject to entry by any other qualified applicant.<sup>5</sup>

§ 508. **The final entry.**—Within the time fixed by the law, *i. e.* one year from filing the declaratory statement, the claimant must make his application to purchase, and submit proof showing compliance with the law. If there is no opposition, he is permitted to make entry and payment. If there are protests or adverse claims, a hearing is had, and the rights determined within the department.

<sup>1</sup> *In re Foster*, 2 L. D. 730.

<sup>2</sup> *In re Colton*, 10 L. D. 422; *In re Largent*, 13 L. D. 397; *In re Burgess*, 24 L. D. 11.

<sup>3</sup> Par. 14, Circ. Instructions. See appendix.

<sup>4</sup> Par. 15, *Id.*

<sup>5</sup> Rev. Stats., § 2350.

§ 509. **Conclusions.**— It will be observed that the nature of the inchoate estate created by compliance with the coal laws, bears a striking analogy to that conferred by the former agricultural pre-emption act. The same analogy exists as to proceedings to acquire the title. One essential difference, however, may be noted: A pre-emption claimant under the agricultural land laws could not assign his rights prior to final entry; a coal claimant may so assign at any stage of the proceedings.

The only feature in common between the coal land system and the general mining laws is, that in both, discovery is required as a condition precedent to the acquisition of title.

The extralateral right has no place in the coal laws. Although many coal veins occupy a more or less vertical position, the only class of entries allowed is by government subdivisions, and the entryman obtains title only to whatever lies within vertical planes drawn through his surface boundaries.

In the case of mining claims, certain prescribed work must be performed annually in order to perpetuate the estate acquired by location. A locator need never apply for a patent. Under the coal laws, no particular amount of expenditure is required, except where an association of not less than four persons seeks to enter six hundred and forty acres, when it is required that they must produce proof of improvements to the extent of five thousand dollars. A patent must be applied for within a year from the filing of the declaratory statement, in case of preferential rights, under section twenty-three hundred and forty-eight of the Revised Statutes. In the case of private entries under section twenty-three hundred and forty-seven, the first step is the application for patent.

As the regulations of the department on the subject of coal are clear and specific, it is not deemed necessary to enter further into the details. We think this and the preceding article present the salient features of the system, and are sufficiently comprehensive for all practical purposes.

## CHAPTER VI.

### SALINES.

§ 513. Governmental policy with reference to salines — Grants to states.	— Territorial limit of its operation.
§ 514. The act of January 12, 1877	§ 515. What embraced within the term "salines."

**§ 513. Governmental policy with reference to salines — Grants to states.**—Properly speaking, the subject of salines and lands containing salt springs and salt deposits is foreign to this treatise. Salt is essentially a mineral,<sup>1</sup> and salt lakes and salt springs legitimately fall within the designation of mineral substances.<sup>2</sup> At one time the land department was of the opinion that this class of lands was subject to entry under the general mining laws;<sup>3</sup> but this doctrine was subsequently denied.<sup>4</sup>

Lands of this character are classed by themselves, and are not subject to entry under any law operative throughout the public land states. Yet they deserve at least a passing notice.

The policy of the government, since the acquisition of the northwest territory and the inauguration of the federal land system, has been to reserve salines and salt springs from sale.<sup>5</sup>

<sup>1</sup> Eagle Salt Works, Copp's Min. Lands, 336.

<sup>2</sup> State of Texas v. Parker, 61 Tex. 265.

<sup>3</sup> Com'rs' Letter, Copp's Min. Lands, 333; Eagle Salt Works, *Id.* 336.

<sup>4</sup> Hall v. Litchfield, Copp's Min. Lands, 333; Salt Bluff Placer, 7 L. D. 549; Southwestern M. Co., 14 L. D. 597; Utah Salt Lands, 13 Copp's L. O. 53.

<sup>5</sup> Morton v. State of Nebraska, 21 Wall. 660; Salt Bluff Placer, 7 L. D. 549; Cole v. Markley, 2 L. D. 847; Southwestern M. Co., 14 L. D. 597.

The object of this reservation was to preserve them for the future states. They have never been disposed of, except under specific acts of congress.

§ 514. **The act of January 12, 1877—Territorial limit of its operation.**—Some of the states, upon their admission to the union, received grants of a certain quantity of saline lands, to be selected usually within a stipulated time. Among these we note Oregon<sup>1</sup> and Colorado.<sup>2</sup> As the law now stands, there is no authority for the disposal of lands chiefly valuable for their salt deposits or salt springs, belonging to the United States, except the act of January 12, 1877.<sup>3</sup>

This act<sup>4</sup> provides for their sale at public auction at not less than one dollar and twenty-five cents per acre, or at private sale at the same minimum rate, in the event sales are not effected at public auction; but the operation of the act is confined to states which have had grants of salines which have been fully satisfied, or under which the right of selection has expired by efflux of time. The act, therefore, does not apply to the territories;<sup>5</sup> nor does it apply to Mississippi, Louisiana, California, Nevada,<sup>6</sup> North and South Dakota, Montana, Washington, Idaho, Utah, or Wyoming, none of which have received a grant of such lands.

§ 515. **What embraced within term "salines."**—Deposits of rock salt fall within the designation of salines, as do salt springs and salt beds,<sup>7</sup> although Commissioner

<sup>1</sup>State of Oregon v. Jones, 24 L. D. 116.

<sup>2</sup>State of Colorado, 10 L. D. 222.

For list of these states admitted prior to 1877, see Hall v. Litchfield, 2 Copp's L. O. 179.

<sup>3</sup>Hall v. Litchfield, Copp's Min. Lands, 333; Salt Bluff Placer, 7 L. D. 549; Southwestern M. Co., 14 L. D. 597.

<sup>4</sup>19 Stats. at Large, 221.

<sup>5</sup>Utah Salt Lands, 13 Copp's L. O. 53; Circ. Instructions, Apr. 10, 1877,

4 Copp's L. O. 21.

<sup>6</sup>Southwestern M. Co., 14 L. D. 597; Public Domain, 696.

<sup>7</sup>Southwestern M. Co., 14 L. D. 597.

McFarland entertained the view that a *ledge* of rock salt might be located under the lode laws.<sup>1</sup>

As to other so-called mineral springs, Secretary Noble expressed an opinion, which is probably a mere *dictum*, that they also should be classified as salines;<sup>2</sup> but Secretary Teller ruled, that lands containing mineral springs not of a saline character are subject to sale under the agricultural land laws.<sup>3</sup>

Sulphur springs are not regarded as saline.<sup>4</sup>

Lands saline in character cannot be entered under the desert land laws.<sup>5</sup>

Tracts of land returned by the surveyor-general as saline may be shown to be agricultural in character, and will then be subject to entry under the agricultural land laws.<sup>6</sup> In other words, the return of the surveyor-general concludes no one.<sup>7</sup>

<sup>1</sup> *In re Megarirrgle*, 9 Copp's L. O. 113.

<sup>2</sup> *Southwestern M. Co.*, 14 L. D. 597.

<sup>3</sup> *Pagosa Springs*, 1 L. D. 562. See, also, *Morrill v. Margaret M. Co.*, 11 L. D. 563.

<sup>4</sup> *Com'rs' Letter*, Copp's Min. Dec. 22.

<sup>5</sup> *Jermy v. Thompson*, 20 L. D. 299.

<sup>6</sup> *Cole v. Markley*, 2 L. D. 847.

<sup>7</sup> See, *ante*, § 106.

## CHAPTER VII.

### MILLSITES.

- |   |  |
|---|--|
| § 519. The law relating to millsites.               | § 523. Nature of use required in case of location by lode proprietor.                      |
| § 520. Different classes of millsites.              |  |
| § 521. Right to millsite—How initiated.             | § 524. Millsites used for quartz mill or reduction works disconnected with lode ownership. |
| § 522. Location of millsite with reference to lode. |  |

§ 519. **The law relating to millsites**—Millsites, while they are frequently important accessions to mining rights, occupy a relatively subordinate position in the federal mining system. Prior to the passage of the mining laws, they, in common with many other privileges asserted on the public domain, were regulated exclusively by neighborhood customs and local rules, not necessarily under the name of millsites, but as surface adjuncts to located lodes.

Until the act of May 10, 1872, was passed, there was no law by which title to them could be obtained. Section fifteen of that act provided a method, which is perpetuated in section twenty-three hundred and thirty-seven of the Revised Statutes. This section is as follows:—

“Where non-mineral land not contiguous to the vein, or lode, is used or occupied by the proprietor of such vein, or lode, for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein, or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins, or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as



“fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works not owning a mine in connection therewith may also receive a patent for his millsite, as provided in this section.”

§ 520. **Different classes of millsites.**—It will thus be observed that the law divides patentable millsites into two classes:—

(1) Such as are used and occupied by the proprietor of a vein, or lode, for mining or milling purposes;

(2) Such as have thereon quartz mills or reduction works, the ownership of which is disconnected with the ownership of a lode, or vein.<sup>1</sup>

The limit as to area and price per acre is the same in both classes, and the requirement, that the lands embraced therein shall be non-mineral, applies equally to each class.

There is nothing to prevent one owning several lode claims from selecting a millsite for each one, provided that each is actually occupied and used for mining or milling purposes in connection with the lode to which it is appurtenant.

It has been held, that a lode proprietor may select more than one tract, if the aggregate does not exceed five acres,<sup>2</sup> provided, of course, that each tract is used for mining and milling purposes in connection with the lode.

There is no provision of law by which a millsite can be acquired as additional to, or in connection with, an existing millsite.<sup>3</sup>

§ 521. **Right to millsite — How initiated.**—The statute is silent as to the manner of locating millsites, but it is not unreasonable to suppose that a location thereof must be made substantially as that of a mining claim.<sup>4</sup> This is the universal practice throughout the mining regions, and this

<sup>1</sup> Rico Townsite, 1 L. D. 556; *Hartman v. Smith*, 7 Mont. 19; *Hamburg M. Co. v. Stephenson*, 17 Nev. 449.

<sup>2</sup> *In re J. B. Haggin*, 2 L. D. 755.

<sup>3</sup> *Hecla Consolidated M. Co.*, 12 L. D. 75.

<sup>4</sup> Rico Townsite, 1 L. D. 556.

practice is recognized by the land department<sup>1</sup> and the courts.<sup>2</sup>

Some of the states have enacted laws prescribing the manner of locating millsites. California,<sup>3</sup> Montana,<sup>4</sup> and Utah<sup>5</sup> have passed laws providing for the posting and recording of notices, the latter state also requiring the boundaries to be marked with the same formality as in case of lode claims.

The mere location of a millsite does not of itself segregate the land from the body of the public domain. A right to be recognized must be based upon possession and use.<sup>6</sup>

Where the land is not in actual use, the claimant must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining and milling purposes.<sup>7</sup>

Mere intention or purpose on a certain contingency of performing acts of use, or occupation thereon, will not satisfy the law.<sup>8</sup>

It is unnecessary to remark, that the tract sought to be obtained for millsite purposes must not only be non-mineral,<sup>9</sup> but it must also be upon the unoccupied, unreserved, and unappropriated domain. As lands not mineral in character may be selected under various laws, the right to appropriate them for millsite purposes cannot be exercised if any lawful possession is held by others. Therefore, millsites may not be selected on lands within the limits of railroad grants after the line of the road has been definitely fixed,<sup>10</sup> nor within the limits of any valid, subsisting, agricultural, or other holding. As between millsite and

<sup>1</sup> *Hargrove v. Robertson*, 15 L. D. 499; *In re George*, 2 Copp's L. O. 114.

<sup>2</sup> *Hartman v. Smith*, 7 Mont. 19.

<sup>3</sup> Act of March, 1897.

<sup>4</sup> Rev. Pol. Code, 1895, §§ 3610, 3612.

<sup>5</sup> Act of March, 1897.

<sup>6</sup> *Rico Townsite*, 1 L. D. 556.

<sup>7</sup> *Two Sisters Lode and Millsite*, 7 L. D. 557; *In re Lennig*, 5 L. D. 190.

<sup>8</sup> *Ontario S. M. Co.*, 13 Copp's L. O. 159.

<sup>9</sup> *Rico Townsite*, 1 L. D. 556; *Atta Millsite*, 8 L. D. 195; *Patterson Quartz Mine*, 4 Copp's L. O. 3; Copp's Min. Dec., 129.

<sup>10</sup> *Mongrain v. N. P. R. R.*, 18 L. D. 105; Copp's Min. Dec., 147.

agricultural claimants, the rights of the parties are determined by priority of possession.<sup>1</sup>

§ 522. **Location of millsite with reference to lode.**—As to the requirement that the land selected for millsite purposes should be non-contiguous to the *lode*, it has uniformly been held by the land department that land contiguous to the surface ground of a lode claim was not within the prohibition named. Millsites may abut against the side lines of a lode claim if the land is non-mineral.<sup>2</sup> Ordinarily they cannot adjoin the end lines,<sup>3</sup> upon the theory that the lode suppositiously crosses these lines, and must, to some extent, at least, exist in the adjacent ground beyond them. But as the character of the land is always a question of fact, if it should be determined that the tract contiguous to the end lines is in fact non-mineral, there is no objection to appropriating it for millsite purposes.<sup>4</sup>

§ 523. **Nature of use required in case of location by lode proprietor.**—The statute does not mention any particular mining purpose for which a millsite, selected by a lode proprietor, shall be used. If used in good faith for any mining purpose at all in connection with a quartz lode, such use would be within the meaning of the statute.<sup>5</sup>

The erection on the tract of a cabin, using the same for storage of tools and supplies, and ores in small quantities, has been held to be within the intent of the law.<sup>6</sup>

It has been said, that using land for deposit of tailings, or storing ores, or for shops, or houses for workmen;<sup>7</sup> for collecting water for motive power,<sup>8</sup> or for pumping

<sup>1</sup> *Sierra Grande M. Co. v. Crawford*, 11 L. D. 338; *Adams v. Simmons*, 16 L. D. 181; *In re Moore*, 11 Copp's L. O. 326.

<sup>2</sup> *In re Freeman*, 7 Copp's L. O. 4.

<sup>3</sup> *Id.*; *In re Long*, 9 Copp's L. O. 188.

<sup>4</sup> *National Mining and Exploring Co.*, 7 Copp's L. O. 179; *In re Long*, 9 Copp's L. O. 188.

<sup>5</sup> *Hartman v. Smith*, 7 Mont. 19.

<sup>6</sup> *Id.* See, also, *Eclipse Millsite*, 22 L. D. 496.

<sup>7</sup> *Satisfaction Extension Millsite*, 14 L. D. 173; *In re Lennig*, 5 L. D. 190.

<sup>8</sup> *Id.*

works,<sup>1</sup> or for obtaining water for use in developing the mine,<sup>2</sup> might be considered proper uses in connection with a located lode, but this does not seem to be a generally accepted rule.<sup>3</sup>

But land cannot be entered as a millsite simply because it has timber growing thereon which is valuable for use on a located lode claim,<sup>4</sup> although the millsite locator may cut the timber growing on the millsite for the purpose of constructing his mill thereon.<sup>5</sup>

The department has permitted the entry of ground for dumpage purposes in tracts of greater area than five acres,<sup>6</sup> on the theory, that it was necessary for use in connection with mining, the land being more valuable for that purpose than any other; but this seems to us an unwarranted interpretation of the law. If ground on which tailings are deposited may be entered as a millsite, dumpage grounds may also be entered for like reasons. It is quite clear, that unless they may be entered under the millsite laws for this purpose, they cannot be entered at all.

The fact, that the lode claim in connection with which the millsite is used is patented, is immaterial. A millsite may be appurtenant to a patented, as well as an unpatented, claim, and patent for the millsite may subsequently be applied for separately.<sup>7</sup>

**§ 524. Millsites used for quartz mill or reduction works disconnected with lode ownership.**—The right to patent a millsite under the last clause of section twenty-three hundred and thirty-seven of the Revised Statutes depends upon the existence on the land of a quartz mill or reduction works.<sup>8</sup>

<sup>1</sup> *Sierra Grande M. Co. v. Crawford*, 11 L. D. 338.

<sup>2</sup> *Gold Springs and Denver City Millsite*, 13 L. D. 175.

<sup>3</sup> *Peru Lode and Millsite*, 10 L. D. 196. See, also, *Iron King Mine and Millsite*, 9 L. D. 201.

<sup>4</sup> *Two Sisters Lode and Millsite*, 7 L. D. 557.

<sup>5</sup> *In re Page*, 1 L. D. 614.

<sup>6</sup> *4 Copp's L. O.* 102.

<sup>7</sup> *Eclipse Millsite*, 22 L. D. 466.

<sup>8</sup> *In re Lennig*, 5 L. D. 190; *In re Cyprus Millsite*, 6 L. D. 706; *Two Sisters Lode and Millsite*, 7 L. D. 557; *Le Neve Millsite*, 9 L. D. 460.

While the nature of the use required in case of the appropriation of a millsite as an adjunct to a located lode is not specified, and the law is satisfied so long as the purposes are reasonably associated with the lode to which it is appurtenant, in the case of sites selected under the last clause of section twenty-three hundred and thirty-seven, the character of the use is distinctly specified.

Land not improved or occupied for mining or milling purposes may not be appropriated as a millsite for the purpose of securing the use of water thereon.<sup>1</sup>

Reservoirs, dams, and plants for generating power do not fall within the designation of quartz mills and reduction works.<sup>2</sup>

Water rights upon the public domain may not be acquired under the millsite laws.

<sup>1</sup> *In re Cyprus Millsite*, 6 L. D. 706; *Mint Lode and Millsite*, 12 L. D. 624.

<sup>2</sup> *Le Neve Millsite*, 9 L. D. 460; *In re Lennig*, 5 L. D. 190; *Two Sisters Lode and Millsite*, 7 L. D. 557.

## CHAPTER VIII.

### EASEMENTS.

§ 529. Scope of the chapter.

§ 530. Rights of way for Ditches  
and canals — Highways.

§ 531. Location subject only to pre-  
existing easements.

§ 529. **Scope of the chapter.**—It is not our present purpose to deal with that class of easements and privileges which are created by the acts of individuals, nor with those which are necessarily appurtenant to all land acquired and held in private ownership. The scope of this chapter is limited to a consideration of those burdens which the government permits to be imposed upon its public lands, and subject to which it subsequently conveys its title.

§ 530. **Rights of way for ditches and canals — Highways.**—During the early period of mining in the west, a system was established by common consent, enabling the miner, in connection with his located mining claim, to exercise certain privileges with respect to the means of working it. Water was essential; therefore, the right to appropriate it, divert it from its natural channel, and conduct it over the public lands by means of flumes and ditches to the place of intended use, became fully recognized and established. The government was not consulted, but it passively recognized these rights, as it did the larger privilege of extracting gold from the public mineral lands,<sup>1</sup> and by section nine of the act of July 26, 1866, gave legislative sanction to the exercise of these asserted rights. The section is as follows:—

<sup>1</sup> See, *ante*, § 45.

“ That whenever, by priority of possession, rights to the  
“ use of water for mining, agricultural, or manufacturing,  
“ or other purposes, have vested and accrued, and the same  
“ are recognized and acknowledged by the local customs,  
“ laws, and the decisions of courts, the possessors and own-  
“ ers of such vested rights shall be maintained and pro-  
“ tected in the same, and the right of way for the construc-  
“ tion of ditches and canals for the purposes aforesaid is  
“ hereby acknowledged and confirmed; *provided, however,*  
“ that whenever, after the passage of this act, any person  
“ or persons shall, in the construction of any ditch or canal,  
“ injure or damage the possession of any settler on the  
“ public domain, the party committing such injury or  
“ damage shall be liable to the party injured for such  
“ injury or damage.”

This section was substantially re-enacted in the Revised Statutes. There are some verbal changes, but none affecting its substance or meaning.<sup>1</sup>

It has been contended, that this act only undertook to confirm and protect rights vested prior to its passage, and that it did not necessarily sanction the future acquisition of such privileges. The opinion of the supreme court of the United States in *Broder v. Natoma Water Company*<sup>2</sup> would appear to support this contention, but as was said by the supreme court of California,<sup>3</sup> in construing this opinion, the question was not before the court. The ditch there involved was completed in 1853, and therefore was clearly within the confirmatory clauses of the act.

The supreme court of Nevada in construing the section in question, after referring to its “*turbid style*,” and “grammatical solecisms,” says:—

“ In its adoption there appear to have been three distinct objects in view:—

“*First*—The confirmation of all existing water rights;

“*Second*—To grant the right of way over the public land  
“ to persons desiring to construct flumes or canals for min-  
“ ing or manufacturing purposes;

<sup>1</sup> *Jennison v. Kirk*, 98 U. S. p. 453, § 456.

<sup>2</sup> 101 U. S., 274.

<sup>3</sup> *Jacob v. Lorenz*, 98 Cal. 332, 336.



"*Third*—To authorize the recovery of damages by "settlers on such land, against persons constructing such "ditches or canals, for injuries occasioned thereby."<sup>1</sup>

The court adds:—

"That this section, granting rights of way over the "public land to all who may desire to construct ditches "or canals for mining or agricultural purposes, is about "as clear and certain as the objects and purposes of the "acts of congress usually are."

The supreme court of California coincides with the views of the supreme court of Nevada.<sup>2</sup>

We have no intention of entering into a discussion of water rights generally, the manner of appropriating them, the purposes for which they may be acquired, or relative rights between such appropriators and riparian proprietors. As water may be the subject of appropriation under certain conditions for many useful purposes, other than as an adjunct to mining operations, and as there is nothing peculiar in the manner of perfecting such appropriation in connection with this particular class of ventures, we shall not undertake to deal with it to any serious extent in this treatise. The law of waters is too broad in its scope to permit its treatment in a collateral way. All that we expect to demonstrate in reference to it is, that mining locations made upon the public lands must be made subject to any easements theretofore lawfully acquired and subsisting, and held for the purposes of conducting water over them. That this is the settled law there can be no doubt.<sup>3</sup>

This is but the reannouncement of the early doctrine, that the miner who selects a piece of ground to work must take it as he finds it, subject to prior rights which have an equal equity, on account of an equal recognition from the sovereign power.<sup>4</sup>

<sup>1</sup> *Hobart v. Ford*, 6 Nev. 77. See, also, *Barnes v. Sabron*, 10 Nev. 217.

<sup>2</sup> *Jacob v. Lorenz*, 98 Cal. 332, 336; *Lorenz v. Waldron*, 96 Cal. 243; *Jacob v. Day*, 111 Cal. 571.

<sup>3</sup> *Jacob v. Day*, 111 Cal. 571; *Rockwell v. Graham*, 9 Colo. 36.

<sup>4</sup> *Irwin v. Phillips*, 5 Cal. 140; *Logan v. Driscoll*, 19 Cal. 623; *Stone v. Bumpus*, 46 Cal. 218.

As to highways, section twenty-four hundred and seventy-seven of the Revised Statutes grants the right of way for the construction of highways over public lands not reserved for public uses. A mining location made subsequent to the laying out of a public road crossing it would be subject to the public easement.<sup>1</sup>

**§ 531. Location subject only to pre-existing easements.**—The right of the United States to grant easements and other limited rights on any portion of its public domain cannot be gainsaid, and subsequent purchasers must take it burdened with such easements or other rights.<sup>2</sup>

“But when it has once disposed of its entire estate in the lands to one party, it can afterwards no more burden it with other rights than any other proprietor of lands.”<sup>3</sup>

The same doctrine applies to perfected mining locations. After such location has once been completed, the estate of its owner cannot be subjected to burdens, except for some public use; or if sanctioned by the state constitution for a private use, upon condemnation proceedings.<sup>4</sup>

This phase of the subject has been discussed by us in a preceding portion of the work,<sup>5</sup> and it is unnecessary to here repeat what was there said.

As to other privileges which may be said to be incident to the ownership of mines and mining claims, we shall consider them when discussing the nature of the title acquired and rights conferred by location.<sup>6</sup>

<sup>1</sup> *Murray v. City of Butte*, 7 Mont. 61.

<sup>2</sup> *Amador-Medean G. M. Co. v. S. Spring Hill M. Co.*, 13 Saw. 523.

<sup>3</sup> *Woodruff v. North Bloomfield Gravel M. Co.*, 9 Saw. 441. See, also, *Dower v. Richards* (Cal.), 15 Pac. 105; *Amador Queen M. Co. v. Dewitt*, 73 Cal. 482.

<sup>4</sup> *Peo v. Dist. Court*, 11 Colo. 147; *Robertson v. Smith*, 1 Mont. 410; *Noteware v. Sterns*, *Id.* 311.

<sup>5</sup> See, *ante*, §§ 252-264.

<sup>6</sup> See, *post*, tit. vi., ch. ii and iii.

## **TITLE VI.**

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### **THE TITLE ACQUIRED AND RIGHTS CONFERRED BY LOCATION.**

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#### **CHAPTER**

- I. THE CHARACTER OF THE TENURE.**
- II. THE NATURE AND EXTENT OF PROPERTY RIGHTS  
CONFERRED BY LODE LOCATIONS.**
- III. THE EXTRALATERAL RIGHT.**
- IV. THE NATURE AND EXTENT OF PROPERTY RIGHTS  
CONFERRED BY PLACER LOCATIONS.**
- V. PERPETUATION OF THE ESTATE BY ANNUAL DEVEL-  
OPMENT AND IMPROVEMENT.**
- VI. FORFEITURE OF THE ESTATE, AND ITS RESTORATION  
BY RESUMPTION OF WORK.**



## CHAPTER I.

### THE CHARACTER OF THE TENURE.

§ 535. Nature of the estate as defined by the early decisions.	§ 540. Nature of the estate compared with copyholds at common law.
§ 536. Origin of the doctrine.	§ 541. Nature of the estate compared with the <i>dominium utile</i> of the civil law.
§ 537. Actual and constructive possession under miners' rules.	§ 542. Nature of the estate compared with inchoate preemption and homestead claims.
§ 538. Federal recognition of the doctrine.	§ 543. Dower within the states.
§ 539. Nature of the estate as defined by the courts since the enactment of general mining laws.	§ 544. Dower within the territories.

§ 535. **Nature of the estate as defined by the early decisions.**—It is somewhat difficult to comprehensively classify the nature of the estate acquired and held by the possessor of a valid mining location, by the use of any definitive term recognized by the common law or employed in the United States to designate a particular tenure.<sup>1</sup>

In the early history of mining jurisprudence, the estate or interest acquired by the miner in his claim, held and worked under the local rules and customs, was treated as an interest in real property. It was liable to sale on execution,<sup>2</sup> and was subject to taxation.<sup>3</sup>

The supreme court of California thus announced its views:—

<sup>1</sup> Judge Knowles in *Black v. Elkhorn M. Co.*, 49 Fed. 549.

<sup>2</sup> *McKeon v. Bisbee*, 9 Cal. 137.

<sup>3</sup> *State of Cal. v. Moore*, 12 Cal. 56; *People v. Shearer*, 30 Cal. 645; *Hale & Norcross M. Co. v. Storey County*, 1 Nev. 82; *People v. Taylor*, 1 Nev. 88; *Forbes v. Gracey*, 94 U. S. 762.

“From an early period of our state jurisprudence we have regarded these claims to public mineral lands as titles. They are so practically. . . . Our courts have given them the recognition of legal estates of freehold; and so for all practical purposes, if we except some doctrine of abandonment not perhaps applicable to such estates, unquestionably they are, and we think it would not be in harmony with the general judicial system to deny to them the incidents of freehold estates in respect to this matter.”<sup>1</sup>

And in a later case the same tribunal stated the rule to be,—

“That although the ultimate fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions and all rights, interests, and estates in the mines are treated as being an estate in fee and as a distinct vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons, but the United States, as the owners of the land and mines therein.”<sup>2</sup>

As was said by the supreme court of Nevada, the courts and the laws adapting themselves to the necessity of the case, and governed by rules of common sense, reason, and necessity, have universally treated the possessory rights of the miner as an estate in fee. Actions for possession, similar to the action of ejectment, actions of trespass, bills for partition,<sup>3</sup> are constantly maintained. Such interests are held to descend to the heir, to be subject to sale on execution, and to be assets in the hands of executors and administrators for the payment of debts.<sup>4</sup>

<sup>1</sup> *Merritt v. Judd*, 14 Cal. 60, cited and approved in *Roseville Alta Co. v. Iowa Gulch*, 15 Colo. 29; *Spencer v. Winselman*, 42 Cal. 479.

<sup>2</sup> *Hughes v. Devlin*, 23 Cal. 502-507; *Watts v. White*, 13 Cal. 321.

<sup>3</sup> *Dall v. Confidence S. M. Co.*, 3 Nev. 531; *Aspen Mining, etc., Co. v. Rucker*, 28 Fed. 220 (disapproving *Strettell v. Ballou*, 3 McCrary, 46; 9 Fed. 256).

But it is seldom that a division of mines may be made. Generally, partition suits must result in sale: *Aspen M. & S. Co. v. Rucker*, 28 Fed. 220; *Lenfers v. Henke*, 73 Ill. 405. See, also, *Coleman v. Coleman*, 19 Pa. St. 100.

<sup>4</sup> *Hale & Norcross G. & S. M. Co. v. Storey County*, 1 Nev. 83.

§ 536. **Origin of the doctrine.**—The dignity thus attaching to the miner's title had its genesis in the early history of mining in the west, and was founded upon the law of possession. It was the natural result of the recognition by local legislatures of mining rights in the public domain, and the exercise of such rights by appropriation under the local rules and customs. As no intruder upon the possession of a prior appropriator could successfully defend an action involving possessory rights, by asserting that the paramount title was in the general government, this antecedent possession was in itself sufficient evidence of title. This was nothing more than the application of a familiar rule of the common law, that as against a mere trespasser, title may be inferred from possession. The actual possessor of real property was so far regarded by law as the owner thereof, that no one could lawfully dispossess him of the same without showing some well-founded title of a higher or better character than such possession itself furnishes.<sup>1</sup>

The early announcement of the doctrine by the courts in the mining states, that controversies between occupants of the public mineral lands were to be determined by the law of possession, and that persons claiming and in the possession of mining claims on these lands were, as between themselves and all other persons, except the United States, owners of the same, having a vested right of property founded on their possession and appropriation,<sup>2</sup> was the declaration of no new canon of jurisprudence.

The enunciation of the rule, that the naked possessor of land was deemed in law the owner until the general government or a person showing title under it makes an entry upon the same, and that when this was done the right or claim of the possessor must yield to the paramount authority of the United States or its grantees,<sup>3</sup> was but a restatement of a well-established rule of law.

<sup>1</sup> 3 Washburn on Real Property, 3d ed., p. 114; 5th ed., p. 134.

<sup>2</sup> Hughes v. Devlin, 23 Cal. 502.

<sup>3</sup> Doran v. C. P. R. R., 24 Cal. 245.



It is also a familiar doctrine of the common law, that where one, under a title deed describing a parcel of land by metes and bounds, enters upon the premises, claiming to hold the same under his deed, he is constructively in possession of all that is included in his deed, though he actually occupies but a part;<sup>1</sup> and by the same rule, any instrument having a grantor and a grantee, and containing an adequate description of the lands to be conveyed and apt words for their conveyance, gives color of title to the lands described.<sup>2</sup>

The application of these elementary rules to the novel and peculiar conditions surrounding the early history of the mining industry in the west, evolved a new *color of title* by which the extent of a miner's right of possession was determined.

§ 537. **Actual and constructive possession, under miners' rules.**—It was early announced as a rule of property, that mining claims were held by compliance with local rules, and *pedis possessio* was not required to give a right of action. When the claim was defined, and a party entered into possession of a *part*, that possession was possession of the entire claim as against any one but the true owner or prior occupant,<sup>3</sup> and priority of occupation established a priority of right.<sup>4</sup>

This doctrine of constructive possession was even extended to instances where the right asserted was not referable to local rules. Thus it was held, that mining ground acquired by an entry under a claim for mining purposes upon a tract, the bounds of which were distinctly marked by physical marks, accompanied with actual occupancy of a part of the tract, was sufficient to enable the possessor to maintain ejectment for the entire claim,

<sup>1</sup> 3 Washburn on Real Property, 3d ed., p. 118; 5th ed., p. 138.

<sup>2</sup> *Id.*, 3d ed., p. 139; 5th ed., p. 167; Brooks v. Bruyn, 35 Ill. 392.

<sup>3</sup> Attwood v. Fricot, 17 Cal. 37; English v. Johnson, *Id.* 107; Roberts v. Wilson, 1 Utah, 292.

<sup>4</sup> Gibson v. Puchta, 33 Cal. 310.

although such acts of appropriation were not done in accordance with any local mining rule.<sup>1</sup>

In such case, however, the extent of such location was not without limit. The quantity taken must have been reasonable, and whether it was so or not was to be determined in such cases by the general usages and customs prevailing upon the general subject. If an unreasonable quantity was included within the boundaries, the location was ineffectual for any purpose, and possession under it only extended to the ground actually occupied.<sup>2</sup>

But as a rule, mere entry and possession gave no right to the exclusive enjoyment of any given quantity of the public mineral lands.<sup>3</sup>

Where an occupant relied upon constructive possession, it devolved upon him to establish three essential facts:—

- (1) That there were local mining customs, rules, and regulations in force in the district embracing the claims;
- (2) That particular acts were required to be performed in the location and working of the claims;
- (3) That he had substantially complied with the requirements.<sup>4</sup>

This rule was somewhat relaxed in favor of a purchaser who entered under a deed which contained definite and certain boundaries which could be marked out and made known from the deed alone,<sup>5</sup> which was nothing more than a reiteration of the doctrine of the common law relative to entries under color of title, heretofore mentioned. The miner's title extended to such mining lands as were reduced to his actual possession, or to such as were constructively in his possession, according to the rules above enumerated.

<sup>1</sup> *Table Mountain T. Co. v. Stranahan*, 20 Cal. 199; *Hess v. Winder*, 30 Cal. 349.

<sup>2</sup> *Table Mountain T. Co. v. Stranahan*, 20 Cal. 199. See *Mallett v. Uncle Sam M. Co.*, 1 Nev. 156.

<sup>3</sup> *Smith v. Doe*, 15 Cal. 101; *Golan v. Hutchinson*, 16 Cal. 154.

<sup>4</sup> *Pralus v. Jefferson G. & S. M. Co.*, 34 Cal. 558.

<sup>5</sup> *Hess v. Winder*, 30 Cal. 349.

§ 538. **Federal recognition of the doctrine.**—While the government passively encouraged and fostered the system of development of the mineral resources as practiced in the mining states and territories, it gave no legislative expression of its encouragement, or any recognition that the occupants of the public mineral lands were other than mere trespassers, until February 27, 1865, when congress passed an act providing for a district and circuit court for the state of Nevada, the ninth section of which provided as follows:—

“That no possessory action between individuals in any  
“of the courts of the United States for the recovery of any  
“mining title, or for damages to such title, shall be affected  
“by the fact that the paramount title to the land on which  
“such mines are, is in the United States; but each case  
“shall be adjudged by the law of possession.”<sup>1</sup>

This was re-enacted in the Revised Statutes,<sup>2</sup> and forms a part of the general legislation of congress on the subject of mineral lands.

The supreme court of the United States, in the case of *Forbes v. Gracey*,<sup>3</sup> approved and confirmed the doctrine of the early decisions as to the nature of locator's estate.

“Those claims,” said that court, “are the subject of bar-  
“gain and sale, and constitute very largely the wealth of  
“the Pacific Coast states. They are property in the fullest  
“sense of the word, and their ownership, transfer, and use  
“are governed by a well-defined code, or codes of law, and  
“are recognized by the states and the federal government.  
“These claims may be sold, transferred, mortgaged, and  
“inherited, without infringing the title of the United  
“States.”

§ 539. **Nature of the estate as defined by the courts since the enactment of general mining laws.**—With reference to the character of the estate held by a mining locator since the passage of the act of July 26, 1866, the decisions of the courts, both state and federal, are quite

<sup>1</sup> 13 Stats. at Large, 441.

<sup>2</sup> 94 U. S. 782.

<sup>3</sup> 119 U. S. 910.

harmonious. They in no way antagonize the theories of the earlier decisions, but adopt them. Naturally, the definition is enlarged and perfected. A mere occupant of lands, who is technically a trespasser, has rights of less dignity than one who enters with the consent of the paramount proprietor under rules defining the terms of his occupancy and the extent and limit of his rights.

Prior to the issuance of a patent, the locator cannot be said to own the fee simple title. The fee resides in the general government, whose tribunals, specially charged with the ultimate conveyance of the title, must pass upon the qualifications of the locator and his compliance with the law. Yet, as between the locator and every one else, save the paramount proprietor, the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee. As between the locator and the government, the former is the owner of the beneficial estate, and the latter holds the fee in trust, to be conveyed to such beneficial owner upon his application in that behalf and in compliance with the terms prescribed by the paramount proprietor.<sup>1</sup>

Until patent issues, the locator's muniments of title consist of the laws under the sanction of which his rights accrue, the series of acts culminating in a completed valid location, and those necessary to be continuously performed to perpetuate it.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. It has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. Actual possession is not more necessary for the protection of the title acquired to such a claim by a valid location than it is for any other grant.<sup>2</sup>

<sup>1</sup> *Noyes v. Mantle*, 127 U. S. 348, 32, 169.

<sup>2</sup> *Belk v. Meagher*, 104 U. S. 279; *Gwillim v. Donnellan*, 115 U. S. 45.

Although the locator may obtain a patent, this patent adds but little to the security of the locator.<sup>1</sup>

The owner of such a location is entitled to the exclusive possession and enjoyment, against every one, including the United States itself.<sup>2</sup>

As was said by the supreme court of Oregon,<sup>3</sup> the general government itself cannot abridge the rights of the miner. There are equitable circumstances binding upon the conscience of the governmental proprietor that must never be disregarded. Rights have become vested that cannot be divested without the violation of all the principles of justice and reason.

The doctrine hereinbefore enunciated has never been seriously questioned. It has been reiterated in many cases in both the state and federal courts.<sup>4</sup> It is too well settled to require further discussion.

§ 540. **Nature of the estate compared with copyholds at common law.**—It has been said, that the interest of a locator of a mining claim is, in some respects, not unlike that of a copyholder at common law: that both had their origin in local customs, and in each the custom crystallized into law; that the copyholder held his land by the custom of the manor, and while the fee remained in the lord, the right to the possession and enjoyment of the premises was in him. He might alienate his lands at will, and on his death they descended to his heirs; the copyholder was a fee holder, yet the fee was in the lord.<sup>5</sup>

The same authority states, that the estate of the copy-

<sup>1</sup> *Chambers v. Harrington*, 111 U. S. 350.

<sup>2</sup> *McFeters v. Pierson*, 15 Colo. 201; *Gold Hill Q. M. Co. v. Ish*, 5 Ore. 104; *Seymour v. Fisher*, 16 Colo. 188.

<sup>3</sup> *Gold Hill Q. M. Co. v. Ish*, 5 Ore. 104.

<sup>4</sup> *Manuel v. Wolff*, 152 U. S. 505; *Black v. Elkhorn M. Co.*, 163 U. S. 445; S. C. before Judge Knowles, 49 Fed. 549; *McFeters v. Pierson*, 15 Colo. 201; *Seymour v. Fisher*, 16 Colo. 188; *Wills v. Blain*, 4 New Mex. 378; *Harris v. Equator M. & S. Co.*, 3 McCrary, 14; *Keeler v. Trueman*, 15 Colo. 143; *Houtz v. Gisborn*, 1 Utah, 173; *Talbott v. King*, 6 Mont. 76; *Silver Bow M. & M. Co. v. Clark*, 5 Mont. 378.

<sup>5</sup> *Black v. Elkhorn*, 52 Fed. 859.

holder might be taken in execution for the payment of his debts. We are not sure that this is a correct statement of the rule of the common law. Blackstone says, speaking of this class of estates, that no creditor could take possession of lands, but could only levy upon the growing profits, so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. Therefore, copyhold lands were not liable to be taken in execution upon a judgment.<sup>1</sup> The American authorities seem to support this view.<sup>2</sup>

Be that as it may, there is one essential difference between the two estates with reference, at least, to the extent of the thing possessed and enjoyed.

In copyhold, or customary lands, the lord of the manor is owner of the minerals, but the tenant is in possession of them, and consequently, in the absence of prescription or a special custom to the contrary, the one cannot explore mines without the consent of the other, although the tenant may continue the working of mines and quarries already opened.<sup>3</sup>

§ 541. **Nature of the estate compared with the dominium utile of the civil law.**—The nature of the estate held by a locator in a mining claim, bears some resemblance to the *emphyteusis* or *dominium utile* of the Roman or civil law. Although the *emphyteuta* did not become owner of the thing, yet he had nearly all the rights of an owner. It was *jus in re aliena*, which in its extent and effects nearly resembled ownership. He had the full right of enjoyment, consequently the right of possessing the thing and of reaping all the fruits thereof. He might dispose of the substance of the thing, transfer the exercise of his right to another, and alienate it, *inter vivos* or *causa mortis*. He might mortgage it and burden it with servitudes, without requiring the consent of the *dominus* thereto.

<sup>1</sup> 3 Blackstone, 418-419.

<sup>2</sup> Watson on Sheriffs, 208; Wildey v. Bonny, 26 Miss. 35; Colvin v. Johnson, 2 Barb. 206; Bigelow v. Fiuch, 11 Barb. 498; 17 Barb. 394.

<sup>3</sup> Rogers on Mines, 270; MacSwiney on Mines, 72; Arundell on Mines, 4; Bainbridge on Mines, 4th ed., p. 37.

His right to absolutely dispose of his estate was subject only to a preferred right of purchase in the *dominus* at the price offered. At the death of the *emphyteuta*, the *emphyteusis* descended to his heirs. The *emphyteutical* right was usually acquired by grant, although it might be acquired by prescription.<sup>1</sup>

“*Dominium utile* is a right which the vassal hath in the “land, or some immovable thing of his lord, to use the “same and take the profit thereof, hereditarily or *in perpetuum*.”<sup>2</sup>

§ 542. **Nature of the estate compared with inchoate pre-emption and homestead claims.**—Judge Ross, in the case of *Black v. Elkhorn*,<sup>3</sup> makes a comparison between the estate held by a mining locator and a pre-emption claimant prior to final entry and payment. While for the purposes of the case then under consideration, where dower was asserted in an unpatented mining claim, the comparison was not wholly inapt, yet we think the inference which may be drawn, that the estate of a mining locator is of no greater dignity than that of an inchoate pre-emption right, should not pass unchallenged. What are the essential differences between the two estates?

(1) By their pre-emption laws, the United States do not enter into any contract with the settler, nor incur any obligation that the land occupied by him shall ever be offered for sale. They simply declare that *in case any of their lands are thrown open for sale* the privilege to purchase shall be first given to parties who have settled upon and improved them.<sup>4</sup>

With reference to its mineral lands, the government has declared that they are free and open to exploration and purchase,<sup>5</sup> and a positive compact is made between the

<sup>1</sup> Kaufman's *Mackeldey*, vol. i, §§ 324–325.

<sup>2</sup> 1 Spence *Eq. Jur.*, 31, 33; *Bowers v. Keesecker*, 14 Iowa, 301.

<sup>3</sup> 52 Fed. 859.

<sup>4</sup> *Hutchings v. Low*, 15 Wall. 77; *Campbell v. Wade*, 132 U. S. 34; *Black v. Elkhorn M. Co.*, 49 Fed. 549.

<sup>5</sup> *Rev. Stats.*, § 2319.



government and the discoverer and locator, whereby the latter, upon compliance with the law, is clothed with the *exclusive* right of possession and enjoyment.<sup>1</sup>

If the government, after a valid mining location has been made, could deprive the locator of his rights, his right of possession certainly would not be *exclusive*.

(2) The pre-emptor is required to apply for patent within a fixed period of time. There is nothing in the mining law requiring a locator to proceed to patent at all. He may never do so, yet his estate is fully maintained in its integrity so long as the law which is a muniment of his title is complied with. The patent adds but little to the security of the locator.<sup>2</sup>

That the general government itself cannot deprive the locator of rights accrued under the mining laws, has, we think, been fully demonstrated.

(3) Prior to entry and payment, the pre-emptor cannot convey or assign his interest to others.<sup>3</sup>

Such a conveyance or assignment would extinguish the pre-emption right.<sup>4</sup>

The right to transfer a mining claim has never been questioned.

(4) It is not until entry and payment under a pre-emption claim that the land becomes subject to taxation by the state.<sup>5</sup>

As we have heretofore shown,<sup>6</sup> mining claims are so subject.

<sup>1</sup> Rev. Stats., § 2322; *Erhardt v. Boaro*, 113 U. S. 527; *Black v. Elkhorn M. Co.*, 59 Fed. 549.

<sup>2</sup> *Chambers v. Harrington*, 111 U. S. 350; *Gold Hill Q. M. Co. v. Ish*, 5 Ore. 104; *Chapman v. Toy Long*, 4 Saw. 28; *Shafer v. Constans*, 3 Mont. 369.

<sup>3</sup> *Dillingham v. Fisher*, 5 Wis. 475; *McLane v. Bovee*, 35 Wis. 27; *Trulock v. Taylor*, 26 Ark. 54; *Busch v. Donohue*, 31 Mich. 482; *Frisbie v. Whitney*, 9 Wall. 187; *Aiken v. Ferry*, 6 Saw. 79; *Lamb v. Davenport*, 18 Wall. 307; *Schoolfield v. Houle*, 13 Colo. 394.

<sup>4</sup> *Quinn v. Kenyon*, 38 Cal. 499.

<sup>5</sup> *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 210.

<sup>6</sup> See, *ante*, § 539.

(5) Inchoate pre-emption claims are not subject to execution so as to enable the purchaser at the sale to obtain title from the government.<sup>1</sup> The contrary has always been the rule as to mining claims.

(6) An inchoate pre-emption could not be disposed of by will. Heirs alone would have the right to complete the entry. Devisees, as such, would not be recognized by the government.<sup>2</sup>

Even an administrator could not perfect the right, unless it was established that there was in existence some person for whose benefit the right might be perfected.<sup>3</sup>

We have heretofore shown<sup>4</sup> the analogy between the mine locator's estate and the *dominium utile* of the civil law. No such analogy exists with reference to pre-emption claims.<sup>5</sup>

What has heretofore been said in reference to inchoate pre-emption claims, applies with equal force to federal homestead claims prior to final entry. It seems to us that the distinction between the character of the estate held by a pre-emptor or homestead claimant, prior to final entry, and the owner of a perfected mining location is decidedly marked.

It has been said that the mining laws provide for three classes of titles:—

- (1) Possessory: a location prior to entry and payment;
- (2) Complete equitable: a location after entry and payment and before patent;
- (3) Fee simple: after patent.<sup>6</sup>

<sup>1</sup> Moore v. Besse, 43 Cal. 511; Bray v. Ragsdale, 53 Mo. 170; Cravens v. Moore, 61 Mo. 178; 1 Freeman on Ex., § 176; Dougherty v. Marcuse, 3 Head, 323; Crutsinger v. Catron, 10 Humph. 24; Rhea v. Hughes, 1 Ala. 219; 34 Am. Dec. 772; Hatfield v. Wallace, 7 Mo. 112; Brown v. Massey, 3 Humph. 470.

<sup>2</sup> Rev. Stats., § 2269.

<sup>3</sup> Elliott v. Figg, 59 Cal. 117.

<sup>4</sup> See, ante, § 541.

<sup>5</sup> Bowers v. Keesecker, 14 Iowa, 301.

<sup>6</sup> American Hill Quartz Mine, 3 Sickles Min. Dec. 377-385; Benson v. Alta M. Co., 144 U. S. 428.

While this may be true in one sense, yet a patent cannot confer any greater rights than those flowing from a valid perfected mining location. Pre-emption and homestead claims pass through the same gradations of title, but the nature and extent of the possessory right conferred are essentially different.

§ 543. **Dower within the states.**— Each state regulates for itself the laws of descent, the domestic relation, and property rights between husband and wife. The subject of dower is one upon which congress may legislate so far as the territories are concerned, but within the states it is powerless to grant the right, or deny its existence where the state creates it. Therefore, in determining what rights, if any, the wife has in the lands or possessions of the husband, in any given state, we must, as a rule, look to state legislation and the decisions of state courts. Of the precious-metal-bearing states, no dower right whatever exists in California, Colorado, Idaho, Nevada, North Dakota, South Dakota, Washington, or Wyoming. In Montana, a widow is entitled to the third part of all lands whereof her husband was seized of an estate of inheritance, and equitable estates are subject to such dower right.<sup>1</sup>

There can be no doubt that as to a patented mining claim, or one that has passed to entry and for which a certificate of purchase has been issued, the dower right would attach, the same as it would to any other class of lands; but as to whether such right could be asserted in a perfected mining location, prior to entry and payment, has been the cause of serious controversy.

In the case of *Black v. Elkhorn Mining Co.*,<sup>2</sup> Judge Knowles held, that such an estate was subject to the wife's dower, but where the husband had conveyed the property to a purchaser who subsequently applied for and received a patent, the wife having failed to assert her rights by adverse claim, the dower right was lost.

<sup>1</sup> *Laws of Montana*, 9th ed., § 1, p. 63; *Chadwick v. Tatem*, 9 Mont. 354; *Black v. Elkhorn M. Co.*, 47 Fed. 600.

<sup>2</sup> 47 Fed., 600.

The case was taken to the United States circuit court of appeals,<sup>1</sup> which court held, that a mere locator of a mining claim, owning only a possessory right conferred by the statute, has no such estate in the property as against the United States or its grantee, as will permit rights of dower to be predicated thereon by virtue of any state legislation. In other words, Judge Knowles gave the right judgment but the wrong reason for it. The supreme court of the United States affirmed the ruling of the circuit court of appeals<sup>2</sup> on parallel lines of reasoning.

To what extent the doctrine of the supreme court of the United States might be deemed binding on the conscience of the state courts is a question not necessary for us to determine. The result reached is manifestly in consonance with the preconceived notions of practitioners in the mining regions. A contrary rule would have disturbed many mining titles, and opened the door to vexatious litigation. If, in the process of reasoning by which the ultimate conclusion has been reached, the dignity of the mining locator's estate has suffered to a slight extent, it has suffered in a good cause. We are fully justified from the foregoing authorities in accepting as a settled doctrine, that in states where the dower right exists by virtue of state legislation, such right will not attach to a mining claim held simply by location.

The states of Oregon and Utah have dower laws similar to those of Montana. Nebraska and Florida, both of which states are nominally subject to the general mining laws of congress, but which are not classified as metal-bearing states, likewise make provision for dower rights in the wife.

**§ 544. Dower within the territories.**—The same rule as to the dower right existing in the states by virtue of state legislation applies with equal force in the territories, where that right is established by act of congress. Under the Edmunds-Tucker amendment to the anti-polygamy

<sup>1</sup> 52 Fed., 859.

<sup>2</sup> *Black v. Elkhorn M. Co.*, 163 U. S. 445.

act,<sup>1</sup> congress provided that a widow should be endowed of a third part of all the lands whereof her husband was seized of an estate of inheritance. The act was, of course, applicable to the then territory of Utah. Whether or not it applied to the other territories, was a mooted question until recently. The question arose in Wyoming, which, while still a territory, passed a law abolishing dower.<sup>2</sup>

A widow asserted a right to dower under section eighteen of the Edmunds-Tucker act, claiming that the passage by congress of that act superseded the territorial law and restored the dower right. The supreme court of Wyoming<sup>3</sup> held, that the act applied only to Utah, and was not operative in any other territory.

This ruling was affirmed by the supreme court of the United States on writ of error.<sup>4</sup>

Dower has been abolished by action of the territorial legislature in Arizona. In New Mexico there is no specific mention of dower in any of its legislation. In this territory the law of community property prevails, which had its origin in the system of the civil law, and was adopted in California and most of the Pacific states and territories.<sup>5</sup>

It may be conceded, that with the exception of those states heretofore enumerated, the dower right does not exist in any of the states or territories within the purview of this treatise.

Whether or not it is necessary in any of the states or territories for a wife to join with the husband in a conveyance of real property, by which term we include mining locations, depends, of course, upon the laws of the several state and territorial jurisdictions. It is beyond the scope of this treatise to enter into a detailed statement of the rules of law regulating conveyancing in these different states. They are general laws, affecting all classes of real property without distinction.

<sup>1</sup> § 18, Act of March 3, 1887, 24 U. S. Stats. at Large, 638.

<sup>2</sup> Act of Dec. 10, 1869; § 2221, Rev. Stats. Wyo., 1887.

<sup>3</sup> *France v. Connor*, 27 Pac. 569.

<sup>4</sup> 161 U. S., 65.

<sup>5</sup> *France v. Connor*, 27 Pac. 569; S. C., 3 Wyo. 445.

## CHAPTER II.

### THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY LODE LOCATIONS.

#### ARTICLE I. INTRODUCTORY—INTRALIMITAL RIGHTS.

##### II. CROSS LODES.

#### ARTICLE I. INTRODUCTORY—INTRALIMITAL RIGHTS.

§ 548. General observations.

§ 549. Classification of rights with reference to boundaries.

§ 550. Extent of the grant as defined by the statute.

§ 551. The right to the surface and presumptions flowing therefrom.

§ 552. Intralimital rights not affected by the form of surface location.

§ 553. Pursuit of the vein on its course beyond bounding planes of the location not permitted.

§ 548. **General observations.**—It has been satisfactorily established that the estate created by a valid perfected mining location, as between the locator and every one else, save the government, is in the nature of a fee simple. Under ordinary circumstances this would be a sufficient characterization of the estate. The attributes of a fee simple estate are well understood, and no explanation is required. But the peculiarities of the mining law render it necessary to elaborate and define with greater particularity than is possible by the use of a single descriptive term, the nature and extent of property rights conferred by perfected mining locations.

There are certain rights which may be said to be common to all classes of locations. There are others which are peculiar to one or the other. In order to treat the subject

analytically, we are compelled to deal with the two classes separately, first considering the subject of lodes, or veins.

§ 549. **Classification of rights with reference to boundaries.**—Property rights conferred by lode locations may be subdivided for the purpose of convenience into two classes:—

(1) Those which are confined to things embraced within the boundaries of the location. By the term boundaries as we here employ it, we include not only the surface lines, but the vertical planes drawn downward through them. If we may be excused for introducing into the mining vocabulary coined and eccentric words, we would classify these rights as *intralimital*;

(2) Those which, while depending for their existence upon the ownership of things within the boundaries, may be exercised under certain conditions and restrictions out of, and beyond, those boundaries. These rights may be classified as *extralimital*.

Whether these terms will ever come into general use or not, they will at least enable the author to formulate his views, express them according to his conception of the law, and group the different elements under distinctive and homogeneous titles. For the purpose of classification, therefore, we may say that property rights flowing from a valid lode location are either intralimital or extralimital. We will examine the nature and extent of these rights in the order named.

§ 550. **Extent of the grant as defined by the statute.**—Section twenty-three hundred and twenty-two of the Revised Statutes provides, that,—

“Locators shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, or ledges, throughout their entire depth, the top, or apex, of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.”



This section is replete with what Judge Lewis, in considering another portion of mining law, characterizes as “grammatical solecisms.”<sup>1</sup>

In the language of Dr. Raymond,—

“This phraseology has the merit of clearly conveying the meaning intended, though descriptive geometry and the English language suffer somewhat in the operation. . . . But the goal is reached, though the vehicle is damaged.”<sup>2</sup>

The section clearly grants the following intralimital rights:—

- (1) Exclusive dominion over the surface;
- (2) The right to certain parts of all veins whose tops, or apices, are found within vertical planes drawn downward through the surface boundaries. The extent to which the locator is entitled to such veins within his surface boundaries will depend upon a number of circumstances, to be fully considered in connection with the subject of extralateral right.

It is quite manifest from a reading of the section, that no title passes *by virtue of the location* to any part of any vein which has its top, or apex, wholly outside of the boundaries of such location.

**§ 551. The right to the surface and presumptions flowing therefrom.**—Whatever may be reserved out of the grant created by the perfection of a valid lode location, one thing is quite manifest. The right of a senior locator to the exclusive possession of the surface cannot be invaded, assuming, of course, that at the time to which the location relates, no rights of way or servitudes were imposed upon the land.<sup>3</sup> While, as we shall hereafter see, outside apex proprietors may penetrate underneath the surface in the lawful pursuit of their veins, the law expressly preserves the surface from invasion.

<sup>1</sup> Hobart v. Ford, 6 Nev. 77.

<sup>2</sup> Law of the Apex, Trans. Am. Inst. Min. Eng., vol. xii., p. 387, 392.

<sup>3</sup> See, *ante*, § 531.

What are the presumptions, if any, flowing from the ownership of the surface?

*Prima facie*, everything within the vertical bounding planes belongs to the locator.

In the language of Judge Hallett,—

"We may say, that there is a presumption of ownership "in every locator as to the territory covered by his location, and within his own boundaries he is regarded as "the owner of all valuable deposits until some one shall "show a higher right."

While the courts do not altogether agree as to the weight of testimony necessary to overthrow this presumption, we think there is an undoubted consensus of opinion in support of the above rule.<sup>1</sup>

We may safely base our discussion of the more important elements of the law applicable to lode locations upon this presumption, and as we progress, endeavor to show the circumstances under which, and extent to which, it may be overcome, reaching ultimate conclusions by such gradations as the nature of the subject will permit.

§ 552. **Intralimital rights not affected by the form of surface location**—We have heretofore suggested, that the ideal location, the one which confers the greatest property rights susceptible of being conveyed under the mining laws, contemplates a surface regular in form along the course of the vein, with end lines crossing it, substantially presenting the form of a parallelogram.<sup>2</sup> A departure from the ideal, however, if the statutory limit is not exceeded as to area, does not destroy or impair the intralimital rights of a locator. The requirement as to non-

<sup>1</sup> *Leadville M. Co. v. Fitzgerald*, 4 Morr. Min. Rep. 380, 385; *Doe v. Waterloo M. Co.*, 54 Fed. 935; *Cons. Wyoming M. Co. v. Champion M. Co.*, 63 Fed. 540; *Duggan v. Davey*, 4 Dak. 110; *Iron S. M. Co. v. Campbell*, 17 Colo. 267; *Cheesman v. Shreve*, 37 Fed. 30; *Montana Co., Limited, v. Clark*, 42 Fed. 626; *Cheesman v. Hart*, 42 Fed. 98; *Bell v. Skillcorn* (New Mex.), 29 Pac. 768; *Jones v. Prospect Mt. T. Co.*, 21 Nev. 339.

<sup>2</sup> See, *ante*, § 340.

parallelism of end lines affects only the extralimital or, strictly speaking, the extralateral rights.<sup>1</sup>

It frequently happens, that locations originally made to approximate the ideal are reduced to irregularly shaped surfaces by reason of conflicts with prior appropriators. In such cases, the right to pursue the vein on its downward course outside of the locator's vertical bounding planes may not exist; but in other respects the locator's rights to whatever may be found within such planes is the same as in the case of a location of the highest type. This is, of course, on the assumption that the location includes some part of the apex of a discovered vein. A location to be valid for any purpose must have within its boundaries such apex.<sup>2</sup> It is unquestionably true that neither the form of the surface location nor the position of the vein as to its course controls or restricts the intralimital rights.

According to Judge Ross,<sup>3</sup> this is the logical deduction flowing from the decision of the supreme court of the United States in the Elgin case.<sup>4</sup>

**§ 553. Pursuit of the vein on its course beyond bounding planes of the location not permitted.**—Subject to the extralateral right of outside apex proprietors, a locator may be said to own all those parts of such veins having their tops, or apices, within the boundaries as are found within such boundaries. Wherever a vein on its course, or strike, passes out of and beyond any one of these planes, the right of the locator to it ceases. Whatever may be his privilege with reference to the pursuit of his vein in depth, longitudinally it cannot be followed beyond any of the boundaries. We have fully explained the rights upon located veins as they were asserted under, and prior to, the passage of the act of 1866.<sup>5</sup> It having been definitely settled by the supreme court of the United

<sup>1</sup> See, *ante*, § 365.

<sup>4</sup> *Iron S. M. Co. v. Elgin M. Co.*, 118 U. S. 196.

<sup>2</sup> See, *ante*, § 364.

<sup>5</sup> See, *ante*, § 58.

<sup>3</sup> *Doe v. Waterloo M. Co.*, 54 Fed. 935, 938.

States in the Flagstaff-Tarbet case,<sup>1</sup> that under the act of 1866 a locator could not pursue his vein on its strike beyond the lines of his location, the application of the doctrine of that case to locations made under the act of 1872 was natural and logical. The rule may be said to be elementary.<sup>2</sup>

This being true, it follows that no other locator can, in the pursuit of his vein *on its strike*, pass through the bounding plane of a senior location. An entry underneath the surface of a prior location is only permitted in the exercise of a right to pursue a vein on its *downward course*. This suggests the subject of cross lodes.

## ARTICLE II. CROSS LODS.

§ 557. Section twenty-three hundred and thirty-six of the Revised Statutes and its interpretation.

§ 558. The Colorado rule.

§ 559. Cross lodes before the supreme court of Montana.

§ 560. The Arizona-California rule.

§ 557. **Section twenty-three hundred and thirty-six of the Revised Statutes and its interpretation.**—As we have observed in a previous chapter,<sup>3</sup> under local rules existing prior to the passage of the act of 1866, as well as under the act itself, the lode was the principal thing granted, and the adjacent surface, if any was actually appropriated, was a mere incident; that only one lode could be held by a single location, and that this could be followed on its course, or strike, wheresoever it might lead to the lawfully claimed limit, without the necessity of enclosing it within surface boundaries.

Where surface boundaries had been established by the prior locator for the convenient working of his lode, a subsequent locator appropriating a separate vein might pursue it into and through the surface ground of the senior locator, but no one was permitted to invade such surface for the purpose of searching for undiscovered veins.<sup>4</sup>

See, *ante*, § 60. Fig. 3, p. 70.

<sup>2</sup> *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478; *Wolfley v. Lebanon M. Co.*, 4 Colo. 112; *Patterson v. Hitchcock*, 3 Colo. 533; *Hall v. Equator M. & S. Co.*, 11 Fed. Cases, No. 5931.

<sup>3</sup> See, *ante*, § 58.

<sup>4</sup> *Atkins v. Hendree*, 1 Idaho, 95.

Such being the recognized rules, it is not difficult to imagine instances of two lodes held in different ownership intersecting or crossing each other on their strike, or onward course, without creating any conflict of title, except at the place of lode intersection or within the space of actual lode crossing.

The act of 1866 made no provision in terms for the determination of rights growing out of such crossings or intersections.

Such were the conditions existing when the act of 1872 was passed, which contained the following provision, now preserved in section twenty-three hundred and thirty-six of the Revised Statutes:—

“Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. . . .”<sup>1</sup>

This is the enunciation of a rule of law, the usefulness of which when applied to the conditions existing at the time of its passage cannot be denied. It established a rule of decision based upon the equitable maxim, that “priority in time establishes a priority of right.” The application of this provision to locations made prior to its enactment is not involved in any serious embarrassment. It is only where attempts are made to apply the rule to locations made and rights asserted under the act of 1872 that apparent difficulties have been encountered, giving rise to a conflict of opinion and diversity of decision.

Whatever may have been the relationship existing between the lode, which was the subject of location, and the adjacent surface ground under the act of 1866, under the existing law the right to any portion of any lode is dependent upon its having its top, or apex, within the surface boundaries of the location. A regular valid location, which

<sup>1</sup> Act of May 10, 1872, § 14.

presupposes the absence of any conflicting surface rights at least, once perfected under the law, vests in the proprietor the ownership of not only the lode upon the discovery of which the location is predicated, but of all other lodes, the tops, or apices, of which may be found within such surface boundaries or within vertical planes drawn through them. The ownership of such other lodes so found is not made to depend upon their general direction or the position they may occupy with reference to the originally discovered lode.

The only limitation upon the grant authorized by section twenty-three hundred and twenty-two of the Revised Statutes is the extralateral right reserved to other locators to follow lodes having apices within their boundaries, on their downward course, outside of and beyond such boundaries, and underneath adjoining surfaces.

Instances may be conceived where two veins might intersect or cross on their strike outside of vertical planes drawn through the surface lines of the several locations. In other words, lodes may intersect on their strike without the existence of any surface conflict or the invasion of the territory included within vertical planes drawn through surface boundaries.<sup>1</sup>

To cases of this character the application of the rule under consideration is accompanied with no more difficulty than its application to cross lodes located under or prior to the act of 1866.

But it has been assumed by the courts of last resort of at least one state in the union that there is an apparent conflict between section twenty-three hundred and twenty-two of the Revised Statutes, defining the nature and extent of the grant to the lode locator, and section twenty-three hundred and thirty-six, relative to cross veins.

The subject under discussion has been considered by the supreme courts in the states of Colorado and California and in the territory of Arizona. The importance of the

<sup>1</sup> See concurring opinion of Chief Justice Beatty in *Wilhelm v. Silvester*, 101 Cal. 358, 364.

question, and the fact that the supreme courts of California and Arizona have, upon a state of facts more or less similar, reached conclusions diametrically opposed to those enunciated by the supreme court of Colorado, render it necessary to examine the adjudicated cases, the facts upon which they were founded, and the reasoning employed to reach the discordant results.

§ 558. **The Colorado rule.**—The inception of what may be termed the Colorado rule is found in an opinion given by Judge Hallett, sitting as circuit judge in the United States circuit court, district of Colorado, upon a motion to dissolve an injunction in the case of *Hall v. Equator Mining and Smelting Co.*<sup>1</sup>

The controversy arose between the Colorado Central lode owned by the plaintiff, and the Equator lode, owned by the defendant. The Equator was located in 1866. The date of the location of the Central is not disclosed by the reported decisions; but the court records establish the fact that it was discovered November 30, 1872.

Both parties claimed under United States patents issued after the passage of the act of 1872. Plaintiff held the senior patent, based on a junior location. The relative position of the two claims is shown in the following diagram (figure 25):—

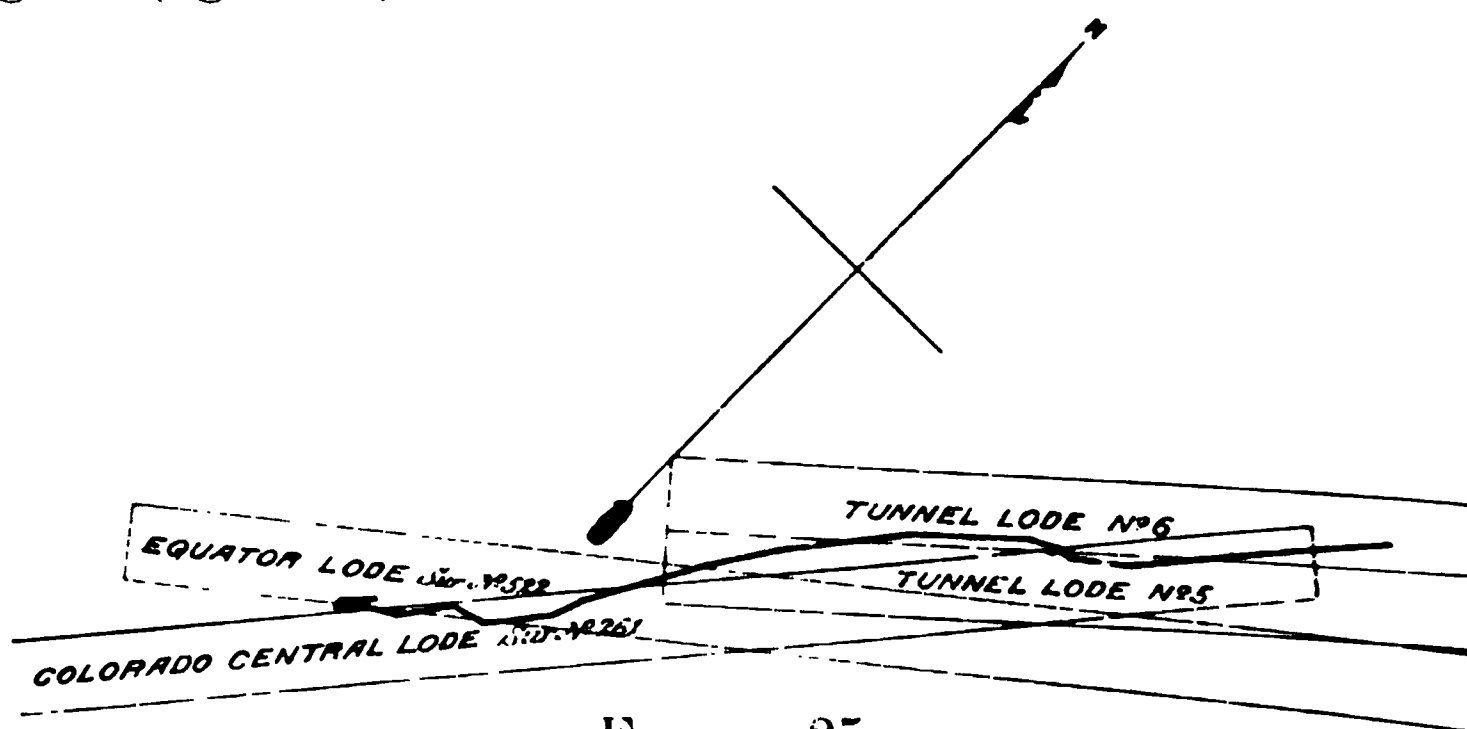


FIGURE 25.

<sup>1</sup> Fed. Cases, No. 5931, *Morr. Min. Rights*, 3d ed., p. 282.



The controversy related to a body of ore found in or under the east end of the Central location, and extending thence westward to and across the intersection with the Equator location.

The motion to dissolve the injunction was heard upon affidavits. There was a sharp conflict as to the facts. The learned judge, with respect to the showing made, uses this language:—

“As was anticipated when the bill was removed into this court, there is no agreement between the parties as to the structure of the lode or lodes and their outcrop. The affidavits suggest several theories without giving certainty to any of them. There may be two veins uniting in their onward course at some point east of the Central location, and thence going westward as one vein, with an outcrop in that location or south of it. And the vein may be so wide at the top as to enter both locations at the point where this controversy arose. And there may be two veins uniting on the strike or on the dip at the very place in dispute. But as to this, it is only necessary to say, that the facts are not satisfactorily stated to lead to a just conclusion. . . . It is enough that there is a strong controversy in which the right of neither party clearly appears. On that alone we interfere to preserve the property for him who may at law prove his right to it.”

The motion to dissolve the injunction was denied, and the parties were relegated to the action of ejectment, then pending, for a trial of the questions of fact.

The court thereupon proceeds as follows:—

“What has been said relates mainly to a question of fact, which it is the opinion of the court should be tried by a jury. Some general remarks in addition, as to the proper construction of the act of congress, may assist the parties in that investigation.”

And after “assuming that these are lodes crossing each other in the manner indicated by the locations,” the judge enunciates the following doctrine:—

“The general language of section twenty-three hundred and twenty-two seems to comprehend all lodes having

“ their tops and apices in the territory described in the  
 “ patent, whether the same lie transversely or collaterally  
 “ to the principal lode on which the location was made.

“ Considered by itself, such would be the meaning and  
 “ effect of that section. But there is another section relat-  
 “ ing to cross lodes, which is of different import. It was  
 “ numbered fourteen in the original act of 1872, section  
 “ twenty-three hundred and thirty-six, Revised Statutes,  
 “ second edition, and is as follows: . . .” [Then follows  
 quotation of section twenty-three hundred and thirty-six.]

“ It will be observed, that by this section the first locator and  
 “ patentee of a lode gets only such part of cross and inter-  
 “ secting veins as lie within the space of intersection, to  
 “ the exclusion of the remainder of such lodes and veins  
 “ lying within his own territory. So far, this section is in  
 “ conflict with section twenty-three hundred and twenty-  
 “ two, before mentioned, and the matter of precedence be-  
 “ tween them is settled by an arbitrary rule established  
 “ long ago. As between conflicting statutes, the latest in  
 “ date will prevail, so between conflicting sections of the  
 “ same statute, the last in the order of arrangement will  
 “ control.<sup>1</sup>

“ The presumption that one section of a statute was  
 “ adopted before another, seems to be very slight, and per-  
 “ haps this rule has no other merit than to afford the  
 “ means of solving a difficult question. But the rule  
 “ appears to be well established, and to be applicable to  
 “ the present case. It gives to section twenty-three hun-  
 “ dred and thirty-six, Revised Statutes, or section fourteen,  
 “ as it stood in the original act, a controlling effect over  
 “ the prior section, and limits the right of the first locator  
 “ of a mine in and to cross and intersecting veins to the  
 “ ore which may be found in the space of intersection. If  
 “ there are in fact two lodes crossing each other in these  
 “ locations, the plaintiffs, having the elder title by patent,  
 “ have the better right, but it is limited as last stated. So  
 “ much as to the theory that there are two lodes intersect-  
 “ ing in their onward course.”

There can be no question but that Judge Hallett, in rendering the foregoing decision, based only upon a hypothetical state of facts and presented in the form of a few

<sup>1</sup> Citing Bacon's Abr. Stat. D. Dwarris, 156; *Brown v. County Com'rs*, 21 Pa. 37; *Smith v. Moore*, 26 Ill. 392.

"general remarks," exceeded the necessities of the case under consideration.

Upon the trial of the case on the merits, a state of facts was developed entirely different from the hypothesis above assumed. Instead of two lodes intersecting each other in the manner indicated by the locations, there was but *one* lode, with part of its width in one location and part in the other.<sup>1</sup>

Yet a precedent had been established by these "few general remarks" which has ever since been followed by the supreme court of Colorado in numerous cases, without even a criticism of the logic of its reasoning or a consideration of the circumstances under which the decision was rendered.

In *Branagan v. Dulaney*,<sup>2</sup> the question arose upon the sufficiency of the answer filed by the defendant, a junior locator, justifying a trespass within the lines of the plaintiff, a senior locator, on the ground that the defendant was the owner of a cross lode and had a right under Revised Statutes, section twenty-three hundred and thirty-six, to drift through the territory covered by the senior location.

The court below having sustained the demurrer to the answer, judgment passed for plaintiff.

On appeal, the supreme court reversed the judgment, basing its decision upon *Hall v. Equator* (*supra*), and the "arbitrary rule of construction suggested by the court" in that case, and holding in effect, that the answer stated a complete defense.

This doctrine has ever since been followed or sanctioned by the supreme court of Colorado.<sup>3</sup>

The circuit court of appeals, eighth circuit, in *Oscamp v. Crystal River Mining Company*,<sup>4</sup> gave its apparent sanction to the doctrine thus enunciated by declining to

<sup>1</sup> Carpenter's Mining Code, 3d ed., p. 65. See note to 11 Fed. Cases, No. 5931.

<sup>2</sup> 8 Colo. 408.

<sup>3</sup> *Lee v. Stahl*, 9 Colo. 208, 13 Colo. 174; *Morgenson v. Middlesex M. & M. Co.*, 11 Colo. 176; *Omara v. Soper*, *Id.* 380; *Coffee v. Emigh*, 15 Colo. 184.

<sup>4</sup> 38 Fed. 293.

controvert it, and in a later case invoked it as an aid to the interpretation of the tunnel laws.<sup>1</sup>

It thus appears that a "few general remarks" made by a judge upon a motion for a preliminary injunction, upon a hypothetical state of facts which was subsequently determined to have had no potential existence, have ripened into a rule of property in at least one state, which, when applied to certain localities and conditions found in that state, is productive of unique results. An illustration of the practical application of the rule accepted by the supreme court of Colorado is shown by an inspection of the official map of the mining region of Cripple Creek in that state.

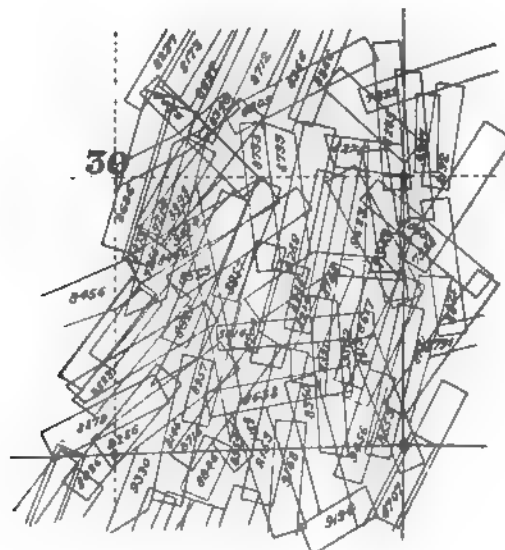


FIGURE 26.

In figure 26 we reproduce from that map a quarter section of land, upon the surface of which mining claims have been officially surveyed, many of which have been patented, overlapping in the manner indicated. Further comment is unnecessary.

<sup>1</sup> Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. 200, 210.

§ 559. **Cross lodes before the supreme court of Montana.**—The subject of cross lodes came before the supreme court of Montana in the case of *Pardee v. Murray*.<sup>1</sup> This case involved a controversy between the Salmon, located in 1866, and the Cliff Extension, No. 2, located in 1867, on the one hand, and the Shark Town and Scratch All lodes,

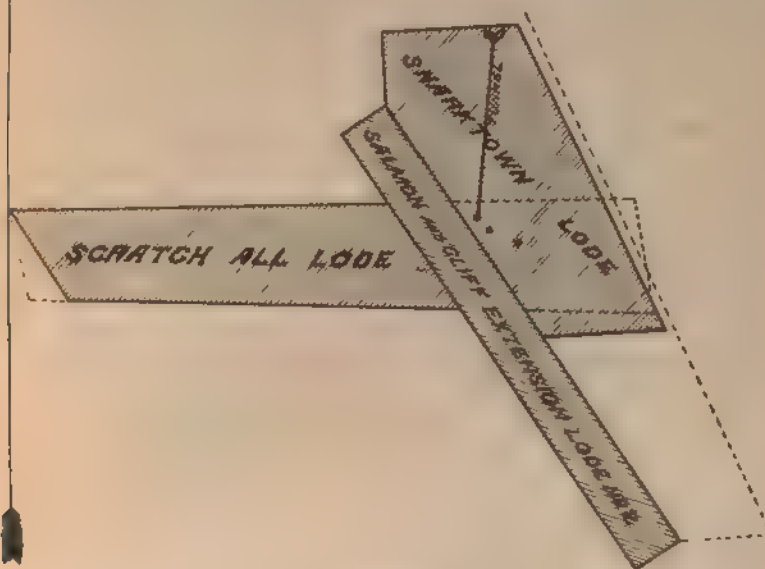


FIGURE 27.

discovered and located in 1875. The relative position of the claims of the contending parties is shown in figure 27.

The court thus expressed its views as to the meaning of the section of the Revised Statutes under consideration:—

"If a vein with a prior location crossed another, such vein would not disturb the possession of the subsequent location, except as to the extent of the cross vein, and would entitle the prior location to the ore and mineral contained in the space of intersection. If with a subsequent location, the locator would be entitled only to a right of way to the extent of his cross vein, for the purpose of working his mine, and to no other right; and

<sup>1</sup> 4 Mont. 234.

"if he should take the ore contained in the space of intersection, he would be a trespasser against whom the prior locator in possession of the surface ground might maintain an action of trespass."

This suggests the view adopted by Mr. Morrison in his "Mining Rights,"—<sup>1</sup>

"That a cross lode takes no estate in the claim it crosses, and has no rights as against the crossed claim, except the mere right to drift through, leaving all the ore as the property of the crossed claim."

§ 560. **The Arizona-California rule.**—A case arose in Arizona out of the following facts, which are illustrated by a diagram, which we here reproduce as figure 28.

The Black Eagle was the prior location, based upon the discovery of a vein having a southeast and northwest course. The Big and Little Comet are locations covering a vein with a course approximately north and south, the owners of which, through means of a tunnel originating in the Big Comet, had penetrated underneath the Black Eagle surface, justifying their right to do so under section twenty-three hundred and thirty-six of the Revised Statutes, claiming the Comet vein to be a cross vein. The surface conflict area is shown on the diagram.

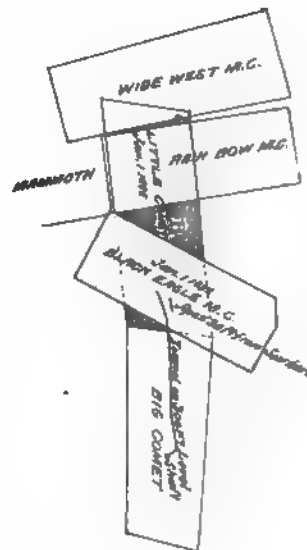


FIGURE 28.

The Colorado rule was urged in support of their contention.

The supreme court of Arizona declined to follow the doctrine of the Colorado courts, and in a well-considered opinion<sup>2</sup> asserts that,—

"The construction urged and supported by the Equator and subsequent Colorado decisions, violates the language

<sup>1</sup> 8th ed., p. 102.

<sup>2</sup> *Watervale M. Co. v. Leach*, 33 Pac. 418.

" of the statute, injects into it things not there, results in  
" conflict in the statute among its parts, and makes infi-  
" nitely more complex the old system of lode claims."

With reference to cases arising under the act of 1872, the rule announced in Arizona recognizes the controlling force of surface boundaries, and denies the right to the junior locator of a so-called cross lode to invade the domain of the senior claimant for any purpose. Says the court:—

" Section twenty-three hundred and twenty-two gives, 'not the lode alone, but all lodes, veins, and ledges, throughout their entire depth, the top, or apex, of which lies inside of the surface lines of the claim extended downward vertically; and as lodes may dip, so that, when followed, they may be found to extend beyond the boundaries of the claim, congress further provides that they may nevertheless be followed. In other words, congress has said to the miners, 'Comply with the requirements that we impose, and the government of the United States will grant absolutely to you a piece of the earth bounded at the surface by straight lines, distinctly marked, and by planes extending through those lines to the center of the earth; and you shall have all lodes of mineral-bearing rock whose apex is within these boundaries.' This is simple, plain, and the miners' rights are thereunder easy of ascertainment."

The opinion of the court is elaborate, and a clear exposition of the law from its standpoint. The court fails to see any conflict between the different sections of the law, and thus denies the necessity for invoking the rule of statutory construction applied by Judge Hallett.

The position assumed in this decision compels the owners of lodes located under the act of 1866 to adverse the application for patent filed by one asserting rights to an overlapping surface location. The right of the first locator to pursue his so-called cross lode into the overlapping claim is lost by failure to adverse. This is in harmony with the rule in Colorado<sup>1</sup> only so far as it affected the right to the ore at the space of intersection.

<sup>1</sup> Lee v. Stahl, 13 Colo. 174, 9 Colo. 208.



In California it has been held, that as to ledges, rights to which accrued prior to the act of May 10, 1872, the act itself reserves them without the necessity of adverseing,<sup>1</sup> and the supreme court of Utah, by a divided court, coincides with the views announced in California;<sup>2</sup> but as to locations made subsequent to 1866, the supreme court of California agrees with the supreme court of Arizona.

The question presented to the California court<sup>3</sup> arose out of an attempt to locate a so-called cross lode over the surface of a prior location. The conflict between the two is illustrated in figure 29, the New Idea being prior in point of time.

In an elaborate opinion, written before the Arizona decision was published, the California court reached the same conclusion as that enunciated by the supreme court of Arizona.

Commenting on the Colorado rule, the supreme court of California asserts,—

“That it would leave the  
“rights of prior locators in  
“the greatest confusion: their  
“property interests in their claims would be undefined,  
“and the result would be ruinous litigation and perhaps  
“personal conflicts.”

Chief Justice Beatty, whose great judicial experience in mining litigation in Nevada and California, in both trial and appellate courts, is a matter of current history, writes a concurring opinion, embodying additional reasons for the rule announced by the court.

The practical application of the Arizona-California rule is shown in the accompanying figure 30, which represents

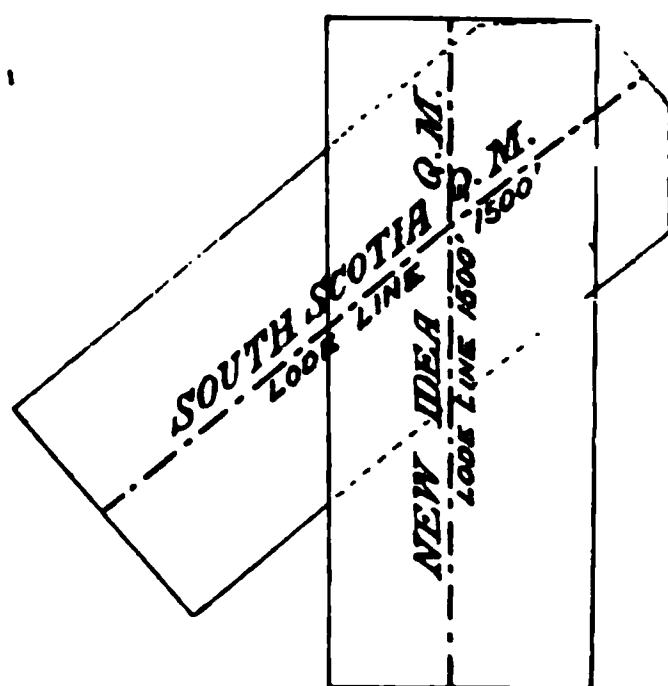


FIGURE 29.

<sup>1</sup> Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304.

<sup>2</sup> Blake v. Butte Silver M. Co., 2 Utah, 54.

<sup>3</sup> Wilhelm v. Silvester, 101 Cal. 358.

a quarter section of land covered by official mining surveys in the Grass Valley region of the latter state, in which locality the California case arose.

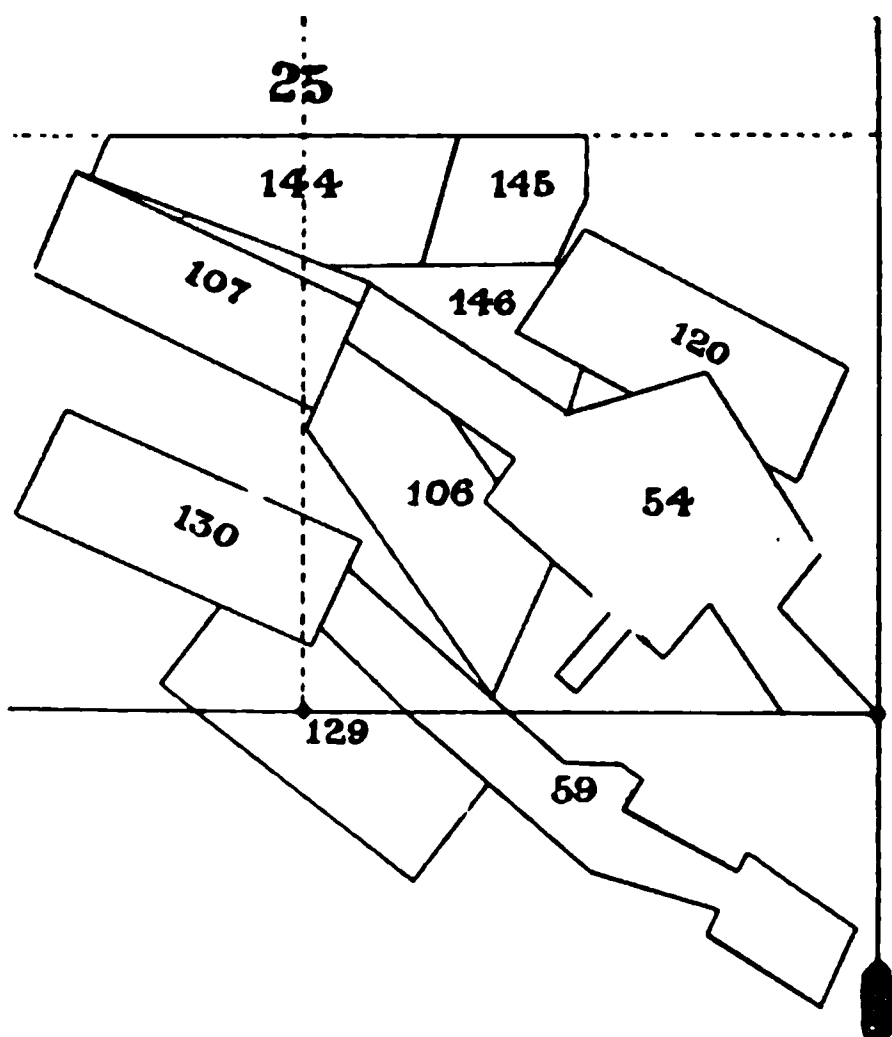


FIGURE 30.

A-comparison of this figure with the one illustrative of the Colorado rule, shown on page 664, illustrates the radical difference between the two doctrines. The irregularly shaped surfaces shown in the California illustration are accounted for by patenting a number of claims in one group, showing only the exterior lines of the composite, a practice at one time followed by the land department. Under the existing rules, group surveys preserve the interior lines of all individual locations embraced therein.

We are convinced that we are justified in adopting the rule as expounded by the courts of Arizona and California in preference to *Hall v. Equator*, *Branagan v. Dulaney*, and the other Colorado cases. Not because more courts have decided one way than another, but for the reason that we believe that the logic and reasoning of the former cases are in line with the rules of construction applied by the supreme court of the United States to the act of 1872 in

other instances, and that the tendency of modern decisions is to recognize the controlling force of surface boundaries. Ever since the decision in the Flagstaff case, the supreme court of the United States has pursued the central idea of referring all rights in lode claims accruing under the act of 1872 to apex and exterior surface lines.

We are impressed with the belief that there is no middle ground between the Colorado and Arizona-California doctrines.

We therefore conclude that a subsequent locator has no right to invade the territory covered by a senior valid subsisting location, or to penetrate within vertical bounding planes drawn through its surface boundaries, except for the single purpose specified in the mining laws, and that is, in the lawful pursuit of a vein on its downward course, the apex of which is properly embraced within the junior location.

The practice of the land department in issuing conflicting junior patents with clauses of exemption and reservation, will be discussed when we consider the subject of patents and the proceedings by which they are obtained.



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